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Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

JANE DOE, mother and legal guardian of JOHN DOE, a minor,

Petitioner,

v.

AMERICA ONLINE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR A WRIT OF CERTIORARI

LLOYD J. HEILBRUNN
Of Counsel
4400 PGA Blvd.
Suite 700
Palm Beach Gardens, FL 33410

BRIAN W. SMITH
Counsel of Record
360 Columbia Drive
Suite 102
West Palm Beach, FL 33409
(561) 684-6330

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether the Florida Supreme Court's holding that Section 230 of the Communications Decency Act provides absolute immunity for an online service provider that knowingly aids in the distribution of child pornography directly contravenes the express intent of Congress and this Court over the past two decades to close the distribution network for child pornography

2. Whether Congress intended for Section 230 of the Communications Decency Act to be given retroactive application

3. Whether Congress intended for Section 230 of the Communications Decency Act to preempt state law by barring claims brought on theories of distributor liability as well as those brought on theories of publisher liability

PARTIES TO THIS PROCEEDING

The petitioner in this case is Jane Doe, mother and natural guardian of John Doe, a minor. The respondent is America OnLine, a division of AOL Time Warner, a computer online service provider and a corporation incorporated in the State of Delaware with principal offices located in Dulles, Virginia.

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PETITION FOR A WRIT OF CERTIORARI

Jane Doe, mother and natural guardian of John Doe, a minor ("Petitioner"), respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Florida in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 783 So.2d 1010 (Fla. 2001) and is set forth in the Appendix ("App.") at A-1. The opinion of the 4th District Court of Appeal for Florida is reported at 718 So.2d 385 (Fla. 4th DCA 1999) and is set forth in the Appendix at A-2. The opinion of the trial court is reported at 25 Media L. Rep. 2112 and is set forth in the Appendix at A-3.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on March 8, 2001. Re-hearing was denied on April 20, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Section 230 of the Communications Decency Act, 47 U.S.C. § 230 ("CDA"), provide:

> (c) PROTECTION FOR 'GOOD SAMARITAN' BLOCKING AND SCREENING OF OFFENSIVE MATERIAL –
>
> (1) TREATMENT OF PUBLISHER OR SPEAKER – No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) CIVIL LIABILITY – No provider or user of an interactive computer service shall be held liable on account of –

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(d) EFFECT ON OTHER LAWS –

(1) NO EFFECT ON CRIMINAL LAW – Nothing in this section shall be construed to impair the enforcement of section 223 of this Act, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

(2) NO EFFECT ON INTELLECTUAL PROPERTY LAW – Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) STATE LAW – Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

Section 847.011(1)(a), Florida Statutes (1993), provides in relevant part:

> Any person who knowingly . . . distributes . . . or offers to sell . . . any obscene . . . photograph . . . [or] image . . . is guilty of a misdemeanor of the first degree. . . .

Section 847.0135(2), Florida Statutes (1993) (Computer Pornography and Child Exploitation Prevention Act of 1986), provides in relevant part:

> COMPUTER PORNOGRAPHY. A person is guilty of a violation of this section if he knowingly . . . transmits by means of computer, or makes, prints, publishes, or reproduces by other computerized means, or knowingly causes or allows to be entered into or transmitted by means of computer, or buys, sells, receives, exchanges, or disseminates any notice, statement, or advertisement, or any minor's name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information, for purposes of facilitating, encouraging, offering, or soliciting sexual conduct of or with any minor, or the visual depiction of such conduct.

STATEMENT OF THE CASE

Petitioner Jane Doe, as Parent and natural guardian of John Doe, a minor, brought suit against Respondent America OnLine (AOL) alleging that AOL knew or should have known that its service was being used by its members to market and distribute child pornography, including videotapes and photographs of the minor Doe. (A-9) AOL moved to dismiss the *initial* Complaint pursuant to Section 230 of the Communications Decency Act (47 U.S.C. § 230), claiming that the Act provided complete

immunity from the allegations of Petitioner's Complaint. (A-10) The Supreme Court of Florida, in a 4-3 decision, found that Section 230 of the Communications Decency Act does, in fact, provide complete immunity from the allegations of the Complaint. (A-1)

During early 1994, Richard Russell committed sexual battery upon Doe, a minor eleven years of age. Russell lured Doe and two other minor males to engage and perform sexual acts with one another and with Russell. Russell photographed and videotaped these sexual acts. (A-9 ¶¶ 23-24).

During 1994, Russell was a subscribing member of AOL. Russell utilized AOL's "Chat Rooms" to advertise, solicit and otherwise market the videotapes and photographs depicting the minor Doe. (A-9 ¶ 26). Chat rooms are defined as "forums in which two or more subscribers may conduct real-time, computer-to-computer conversations. . . . " The content of the speaker's transmissions are available for view by other members of AOL's online service who are also in attendance in the chat room. Russell successfully engaged other members of AOL's service to purchase the video and photographs which depict obscene and unlawful images of the minor Doe. (A-9 ¶ 26).

For the purpose of this appeal, Doe's averments that AOL expressly prohibited the actions taken by its member Russell against Doe are undisputed. Doe alleged in the Complaint that AOL has promulgated "Terms of Service" and "Rules of the Road" which govern the behavior of its members while online. There is no dispute that Russell's activities violated AOL's rules and no dispute that Russell's activities constituted grounds for terminating Russell's America OnLine membership. (A-9 ¶¶ 10-14). Also uncontested is Doe's allegation that AOL

had knowledge of Russell's unlawful actions as well as other pedophile activity. Doe's Complaint alleges that as early as 1991, AOL was on notice that its online service was utilized worldwide by pedophiles as an open forum to discuss, trade and market child pornography. (A-9 ¶ 18). AOL had, in effect, become a "marketplace for the sale and distribution of child pornography." (A-9 ¶ 19). Doe's Complaint further alleges that although complaints were communicated to AOL regarding unlawful pedophile behavior, Russell was allowed to continue utilizing AOL's services to the detriment of minor Doe. (A-9 ¶ 22).

Doe's Complaint alleges two counts of negligence per se against AOL for violation of Sections 847.011 and 847.0135, Florida Statutes. Specifically, Doe alleges that AOL violated Section 847.011 by " . . . knowingly allowing and permitting Russell to sell, distribute, transmit or offer[ing] to sell, distribute or transmit photographs and videotape containing the images of the minor Plaintiff . . . " (A-9 ¶ 29).

Furthermore, Doe alleged that AOL violated Section 847.0135(2), Florida Statutes, (more commonly known as the Computer Pornography and Child Exploitation Prevention Act of 1986), by "knowingly allowing Russell to enter into or transmit by means of computer the distribution of an advertisement for the purposes of offering a visual depiction of sexual conduct involving the minor Plaintiff, Doe." (A-9 ¶ 31). Doe specifically alleges that "AOL, INC. further violated this section by knowingly allowing Russell to sell or arrange to sell child pornography. . . . By its actions or inactions, AOL, INC. has *aided* in the sale and distribution of child pornography, including obscene and unlawful images of the minor Plaintiff, Doe." (Emphasis Added) (A-9 ¶¶ 32-33).

Doe also alleges general negligence against AOL. (A-9 ¶¶ 40-44). Doe contends that "AOL, INC., had a duty to exercise reasonable care in the operation of its AOL Service to ensure that its AOL Service was not being used for the purposes of the sale and/or distribution of child pornography." (A-9 ¶ 41).

AOL filed a Motion To Dismiss the Initial Complaint, contending that Section 230 of the CDA preempted Florida Law and granted AOL complete immunity for all claims involving third party postings (A-10). The trial court granted the Motion To Dismiss with prejudice and held that Section 230 of the CDA completely barred Doe's claims, and by denying Doe leave to amend, held by implication that Section 230 completely barred all possible claims by Doe (A-3). The Fourth District Court of Appeal of Florida affirmed the trial court's Order, but certified the issues involved to the Supreme Court of Florida as issues of great public importance. *Doe v. America Online*, 718 So.2d 385 (Fla. 4th DCA 1999) (A-2).

The Supreme Court of Florida, in a 4-3 decision, likewise held that Section 230 of the CDA barred all potential claims by Doe. *Doe v. America Online*, 783 So.2d 1010 (Fla. 2001) (A-1). The narrow majority of the Supreme Court of Florida set forth its reasoning as follows:

> "The certified questions in this case focus upon the application of 47 U.S.C. § 230 to Florida tort actions that are based upon alleged 'distributor' liability of ISPs. We first address the Fourth District's second and third certified questions and rephrase them into this combined question:
>
> > 'Whether section 230 preempts Florida law as to causes of action based in negligence against an Internet Service

Provider (ISP) as a distributor of information allegedly in violation of Florida criminal statutes prohibiting the distribution of obscene literature and computer pornography?'

For the purpose of answering the certified question, but without deciding, we accept that the complaint in this case states a cause of action under Florida law (FN 6) for liability in negligence against AOL as a distributor of information. We answer the rephrased certified question in the affirmative and find that section 230 does preempt Florida law as to such a cause of action based upon alleged negligence.

(FN 6) We accept that the allegations are based upon information distributor liability in accord with section 581 of the Second Restatement of Torts (1977) and as impliedly recognized in *Cardozo v. True*, 342 So.2d 1053, 1056 (Fla. 2d DCA 1977), and based upon a statutory violation under *DeJesus v. Seaboard Coast Line Railroad Co.*, 281 So.2d 198, 201 (Fla. 1973).

We find persuasive the reasoning of the United States District Court in *Zeran v. America Online, Inc.*, 958 F. Supp. 1124, 1131-37 (E.D. Va. 1997), and the Fourth Circuit in *Zeran*, 129 F.3d at 331-32.

The importance of this certified question is obvious in light of the current explosive growth in worldwide use of the Internet. The fundamental issue here is whether companies that provide access to the Internet are subject to common-law civil tort causes of action based upon the laws of each of the fifty states or whether Congress has acted to make ISPs immune from such common-law civil actions. *Doe*, at 1014.

* * *

Using this history as a basis for our reading of section 230, we turn to the issue of preemption of Florida law. The reasoning of the United States District Court in *Zeran* is incisive and directly on point on this issue:

* * *

> 'Specifically, AOL points to § 230(c)(1), which states that [n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
>
> Zeran does not contest that AOL is an interactive computer service as defined by the CDA and it is clear that AOL meets the statutory definition of such a service. Nor does Zeran claim that the bogus notices were anything but "information provided by another information content provider." *Thus, the preemption issue reduces to the question whether a state cause of action for negligent distribution of defamatory material directly conflicts with the CDA's prohibition against treating an Internet provider as a "publisher or speaker." Put another way, the question is whether imposing common law distributor liability on AOL amounts to treating it as a publisher or speaker. If so, the state claim is preempted.*
>
> The key to answering this question lies in understanding the true nature of so-called distributor liability and its relationship to publisher liability. At the heart of Zeran's argument is the premise that distributor liability is a

> common law tort concept different from, and unrelated to, publisher liability. *This is not so; distributor liability, or more precisely, liability for knowingly or negligently distributing defamatory material, is merely a species or type of liability for publishing defamatory material.'* (Emphasis in original). *Doe*, at 1015-6, quoting *Zeran*.
>
> * * *
>
> AOL falls squarely within this traditional definition of a publisher and, therefore, is clearly protected by § 230's immunity. *Zeran*, 129 F.3d at 331-32 (emphasis added). It is precisely the liability based upon negligent failure to control the content of users' publishing of allegedly illegal postings on the Internet that is the gravamen of Doe's alleged cause of action.
>
> Such publication of obscene literature or computer pornography is analogous to the defamatory publication at issue in the *Zeran* decisions. Therefore, our agreement with the reasoning of the federal district court answers the certified question as to preemption.
>
> Accordingly, we answer the combined and rephrased certified question in the affirmative." *Doe*, at 1017.

Since the allegations of the Doe's Complaint were based on facts which predated the enactment of Section 230 of the CDA, the Supreme Court of Florida also held that the immunity provided was retroactive in effect. The Supreme Court of Florida reasoned as follows:

> * * *
>
> "We next turn to the first certified question, which is whether Section 230 applies to complaints filed after its effective date where the complaint alleges a cause of action based upon

acts occurring prior to its effective date. Again, we find to be correct the reasoning of the United States District Court in *Zeran*:

> 'Zeran contends that even if the CDA preempts a state law cause of action for negligent distribution of defamatory statements, it cannot have that effect here without violating the stricture against retroactive application of statutes. The CDA was signed into law and became immediately effective on February 8, 1996, over nine months after the posting of the bogus notices that form the basis of *Zeran*'s claims against AOL. Yet, Zeran did not file this complaint until April 1996, two months after the CDA went into effect. This, then, is a case brought after a statute's enactment but based on facts that occurred prior to its enactment. In these circumstances, a statute may not have a "retroactive effect" absent a clear expression of congressional intent with respect to such retroactivity. See *Landgraf v. USI Film Products*, 511 U.S. 244, 280-81 (1994). Thus, a court must first determine whether Congress has clearly expressed the statute's intended temporal reach. If so, the judicial inquiry is complete and Congress' clear intent must be implemented. *Id.* If, on the other hand, the statute has no express Congressional command with respect to its temporal application, courts must undertake a second inquiry to determine whether the application of the statute will result in a prohibited "retroactive effect." *Id.*

> In this case, the first step is dispositive, Congress has made its intent manifest.
>
> Section 230 clearly reflects Congress' intent to apply the CDA to all suits filed after its enactment, notwithstanding when the operative facts arose. Thus, in § 230(d)(3), the CDA provides, in pertinent part, that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."
>
> *This subsection does not generally refer to conflicting state laws having "no effect" or being "preempted." To the contrary, it specifically provides that "[n]o causes of action may be brought." And such clear statutory language cannot reasonably be construed to mean that only some causes of action may be brought, namely those concerning events arising before the enactment of the CDA.' Zeran,* 958 F. Supp. at 1135-37 (citations and footnotes omitted) (emphasis added).

We specifically concur that section 230 expressly bars "any actions" and we are compelled to give the language of this preemptive law its plain meaning. We therefore concur with the Fourth District Court of Appeal in its holding that Doe's cause of action against AOL is barred by the plain language of section 230 (d)(3)." (emphasis in original). *Doe,* at 1018

The Supreme Court of Florida denied Doe's Motion for Re-hearing (A-4) and this Petition follows.

REASONS FOR GRANTING THE WRIT

I. THE INTERPRETATION OF SECTION 230 BY THE FLORIDA SUPREME COURT BELOW DIRECTLY CONTRAVENES THE EXPRESS INTENT OF CONGRESS AND THIS COURT OVER THE PAST TWO DECADES TO CLOSE THE DISTRIBUTION NETWORK FOR CHILD PORNOGRAPHY

Over the past two decades, this Court and the United States Congress have expressed a desire and intent to destroy the free market of child pornography that had blossomed in this country. However, the Florida Supreme Court's holding below directly contravenes this public policy as eloquently noted by Justice Lewis in the dissenting opinion below:

> "Given the precise, limiting language of the statute, the stated policy underlying the CDA, and the CDA's explicit legislative history, it is inconceivable that Congress intended the CDA to shield from potential liability an ISP alleged to have taken absolutely no actions to curtail illicit activities in furtherance of conduct defined as criminal, despite actual knowledge that a source of child pornography was being advertised and delivered through contact information provided on its service by an identified customer, while profiting from its customer's continued use of the service. Such an interpretation transforms a statute intended to further and support responsible ISP efforts to protect children and the public from even questionably harmful and illegal materials into a statute which both condones and exonerates a flagrant and reprehensible failure to act by an ISP in the face of allegedly specific, known dissemination of material unquestionably harmful to children. (footnote omitted) In my view, the interpretation adopted today provides a foundation for far-ranging

> forms of illegal conduct (possibly harmful to society in far different ways) which ISPs can, very profitably and with total immunity, knowingly allow their customers to operate through their Internet services. I fear that the blanket immunity interpretation adopted by the majority today thrusts Congress into the unlikely position of having enacted legislation that encourages and protects the involvement of ISPs as silent partners in criminal enterprises for profit." *Doe*, at 1028.

Child pornography is a problem of international proportion. Experts universally agree that children are at risk from those who engage in the production, distribution, and consumption of child pornography and that children can suffer long lasting effects as a result of pornographic exploitation. Furthermore, the development of computer technology has expanded the international production and distribution of child pornography to an unimaginable degree.

In fact, in 1982, this Court recognized that the exploitive use of children in the production of pornography had become a serious national problem. *New York v. Ferber*, 458 U.S. 747, 764 (1982). In a footnote, this Court stated that "Child pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale."[1] In response to the growing problem, thirty-five States and the United States Congress had passed legislation prohibiting the distribution of such materials and twenty States prohibited the distribution of material depicting children

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[1] Citing No. 95-438, p. 5 (1977), U.S. Code Cong. & Admin. News 1978, pp. 40, 42.

engaged in sexual conduct without requiring that the material be legally obscene. *Id.* at 749.

This Court recognized that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." *Id.* at 757, quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). This Court held, in upholding a statute prohibiting the distribution of child pornography, that States are entitled to greater leeway in the regulation of child pornography because of the State's interest in preventing the sexual exploitation of children and in closing down the distribution network that generates the market for child pornography, which in turn leads to the abuse of children involved in the production of the materials. *Id.* at 757-59. "The distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be controlled." *Id.* at 759.

In *Osborne v. Ohio*, 495 U.S. 103 (1990), this Court upheld a state statute that proscribed the possession and viewing of child pornography, reaffirming that "it is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor is compelling." *Id.* at 109 (quoting *Ferber*, 458 U.S. at 756-757).

Likewise, over the past two decades or so, it has been the clear intent of the U.S. Congress to legislate the destruction of the market for child pornography. A brief history of legislation enacted by Congress reflects the concerted effort to eliminate the production, distribution and marketing of child pornography.

An intent to eliminate the "highly organized, multi-million dollar industries" involved in child pornography led Congress to enact the Protection of Children Against Sexual Exploitation Act of 1977 (Title 18, United States

Code, §§ 2251-2254). The law prohibits the use of a minor in the making of pornography, the transport of a child across state lines, the taking of a pornographic picture of a minor, and the production and circulation of materials advertising child pornography. It also prohibits the transfer, sale, purchase, and receipt of minors when the purpose of such transfer, sale, purchase, or receipt is to use the child or youth in the production of child pornography. The transportation, importation, shipment, and receipt of child pornography by any interstate means, including by mail or computer, is also prohibited.

In 1984, Congress passed The Child Protection Act (18 U.S.C. §§ 2253-2254) which defined anyone younger than the age of 18 as a child. Therefore, a sexually explicit photograph of anyone 17 years of age or younger is deemed to be child pornography.

In 1986, Congress passed the Child Sexual Abuse and Pornography Act (18 U.S.C. §§ 2421-2423), which banned the production and use of advertisements for child pornography and included a provision for civil remedies for personal injuries suffered by a minor who is a victim. It also raised the minimum sentences for repeat offenders from imprisonment of not less than two years to imprisonment of not less than five years.

In 1988, Congress enacted the Child Protection and Obscenity Enforcement Act (18 U.S.C. §§ 2251A and 2257) making it unlawful to use a computer to transmit advertisements for, or visual depictions of, child pornography and prohibiting the buying, selling or otherwise obtaining temporary custody or control of children for the purpose of producing child pornography.

In 1990, Congress amended 18 U.S.C. §§ 1460, 2243, 2252, and 2257 and made it a federal crime to possess three or more depictions of child pornography that were

mailed or shipped in interstate or foreign commerce or that were produced using materials that were mailed or shipped by any means, including by computer.

With the passage of the Telecommunications Act of 1996 (Pub. L. No. 104-104, 110 Stat. 56), 47 U.S.C. § 151, *et seq.*, Congress made it a federal crime for anyone to use the mail, interstate or foreign commerce, to persuade, induce, or entice any individual younger than the age of 18 to engage in any sexual act for which the person may be criminally prosecuted.

The Child Pornography Prevention Act of 1996 (the "CPPA"), 47 U.S.C. § 2256, enacted the same year as Section 230, extended the definition of "child pornography" to include "morphed" or computer generated images, and material advertised as child pornography. Computer technology has allowed for the creation and alteration of images that have been altered to look like children even though the subjects photographed may have actually been adults. Persons who alter pornographic images to give the impression that the images are of children can now be prosecuted under the law.

In enacting the CPPA, members of Congress, in "Subsection 1 – Findings", made several findings that are relevant to a determination of whether they would have intended Section 230 to provide immunity where online services are used in the distribution and trafficking of child pornography.

> The relevant findings of Congress were as follows:
> "Subsection 1. Findings
> Congress finds that –
> (2) where children are used in its production, child pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing

harm by haunting those children in future years; and

(10)(A) the existence of and traffic in child pornographic images creates the potential for many types of harm in the community and presents a clear and present danger to all children; and

(B) it inflames the desires of child molesters, pedophiles, and child pornographers who prey on children, thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as a result of the existence and use of these materials; and

(13) the elimination of child pornography and the protection of children from sexual exploitation provide a compelling governmental interest for prohibiting the production, distribution, possession, sale, or viewing of visual depictions of children engaging in sexually explicit conduct, including both photographic images of actual children engaging in such conduct and depictions produced by computer or other means which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children engaging in such conduct."

The 1st Circuit Court of Appeals has noted that Congress enacted the CPPA to modernize federal law by enhancing its ability to combat child pornography *in the cyberspace era* and to broaden the scope of federal anti-child pornography statutes to address "a set of related concerns aimed at the ultimate goal of destroying the underground supply of child pornography in all of its manifestations". (emphasis added). *United States v. Hilton*, 167 F.3d 61, 66 (1st Cir. 1999). In a footnote, the *Hilton* Court notes that the United States is one of several countries that have begun to grapple with the effects of the

technological revolution on the child pornography trade. The Court states that Congress wished to deprive child abusers of a "criminal tool" frequently used to facilitate the sexual abuse of children. It is again important to note that the CPPA was enacted the same year that Section 230 was enacted.

It makes no sense that Congress would, on the one hand, make a conscious decision to pass legislation preventing the dissemination of child pornography in the computer age and then, on the other hand and in the same year, pass legislation that provides immunity for the distribution of child pornography through "cyberspace". It also makes no sense that Congress would pass legislation aimed at eliminating "criminal tools" for child abusers and then pass legislation that would provide an open marketplace for the by-product of that child abuse.

Even after the enactment of Section 230, and based on this Court's ruling striking down, on First Amendment grounds, portions of the Communications Decency Act (CDA) in *Reno v. American Civil Liberties Union*, 521 U.S. 844, Congress passed the Child Online Protection Act (COPA) (47 U.S.C. § 231) in 1998 which seeks to "protect minors from 'harmful material' measured by 'contemporary community standards' knowingly posted on the World Wide Web for commercial purposes." The passage of this Act reflects the continued intent of Congress to pass legislation protecting children from exploitation and abuse via computer.

As currently interpreted by the Florida Supreme Court below and the 4th Circuit Court of Appeals in *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997), Section 230 allows for the free flow of the products of child abuse that Congress has specifically said that they

want to destroy. One can only imagine the numbers of children that will unwillingly follow in the footsteps of young Mr. Doe as they become subjects for the by-products of the market of child pornography that has been created by this interpretation.

The 3rd Circuit Court of Appeals has noted that the intent of Congress is "to discourage the intrastate possession of pornography which will cause some of these child pornographers to leave the realm of child pornography completely, which in turn will reduce the interstate demand for pornography – *the very activity Congress wished to suppress* through regulation" [emphasis supplied]. *United States v. Rodia*, 194 F.3d 465 (3rd Cir. 1999).

The 7th Circuit Court of Appeals has recognized that the distribution of child pornography poses a greater danger than the mere possession of child pornography. *United States v. Richardson*, 238 F.3d 837 (7th Cir. 2001). "Receivers increase the market for child pornography and hence the demand for children to pose as models for pornographic photographs". *Id.* at 839. The Court noted that the nature of the interstate and international trafficking of child pornography not only increases the demand for the production of such pornography but, by virtue of its far-flung scope, makes it extremely difficult to locate, let alone protect, the children exploited by it. "Concern with the welfare of the children who are used to create pornography is part of the public concern over child pornography and this makes the receiver a greater malefactor than the possessor". *Ibid.*

As this Court stated in *Ferber*:

> "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The care of children is a sacred trust and should not be

> abused by those who seek to profit through a commercial network based upon the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual performances". *Id.* at 757.

The interpretation of Section 230 by the Florida Supreme Court below, following the interpretation of the *Zeran* court, has reopened the distribution network that this Court, together with the States and the United States Congress, fought so hard for decades to close down. It has also served to undermine the protection that the children of this country have found in the decisions of this Court and the Acts of the United States Congress. Under the current interpretation, AOL and other online services can willingly and knowingly participate and aid in the distribution network and themselves profit through the commercial exploitation of children and then seek refuge under the Good Samaritan provisions of Section 230. That is outrageous and certainly wasn't the intent of Congress in enacting this Section.

As expressed in 47 U.S.C. § 230(b), "the stated policy of the United States" is "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." Section 230 was enacted to promote decency not to encourage criminal pornographic enterprise. The extended immunity accorded to online service providers by the Florida Supreme Court in fact impedes the expressly stated goals of the Act. By rewarding an online service provider that acted in bad faith per se, it disregards the statutory predicate to the immunity provision – "Protection for Good Samaritan Blocking and Screening."

There is a manifest qualitative difference between defamatory speech and the knowing transmission of child pornography in violation of state and federal law. Defamation is speech and child pornography is criminal activity that victimizes children. This Court has consistently ruled that no aspect of child pornography and no participant in child pornography has any First Amendment or other legal protection.

At issue is a state civil action in tort against AOL for its conscious assistance in the distribution and transmission of child pornography in violation of Florida Statutes 847.011 and 847.0135. These statutes regulate conduct, not speech, and violation of these statutes gives rise to civil liability in negligence per se. As the protection of the health and safety of its citizens through criminal statutes and civil actions is incontrovertibly within the traditional police power of the state, the presumption is that the CDA does not in fact preempt the action at bar. Only if Congress evidenced a clear and manifest intent to bar this action can the court properly find preemption. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); *Medtronic, Inc. v. Lohr* 518 U.S. 470 (1996). To the contrary, Congress, together with this Court, has expressed a clear and manifest intent to encourage the states to regulate the production and distribution of child pornography, as noted in *Ferber* and the other cases discussed above.

The absence of any alternative remedy or scheme of compensation for a party injured by the misconduct of an online service provider bespeaks a lack of congressional intent to effect a wholesale displacement of state tort law, which, absent federal regulation, is the only viable means by which to hold online service providers accountable for willful and tortuous misconduct. Because the CDA does not provide an alternative remedy for redress of injuries

caused by an online service provider nor does the CDA create a regulatory scheme to supervise online service providers, a finding of implied preemption of state civil actions beyond the scope of the express congressional preemption of publisher liability for good faith blocking is completely unwarranted.

This Court should grant the Petition, reconcile the stated intent of Section 230 with the efforts of Congress and this Court over the past two decades to close the distribution network for child pornography and clarify that Section 230 does not preempt causes of action based on state child pornography laws that are consistent with Section 230.

II. THE FLORIDA SUPREME COURT ERRED IN FINDING THAT SECTION 230 APPLIES RETROACTIVELY TO EVENTS GIVING RISE TO CLAIMS BEFORE ITS ENACTMENT

The facts giving rise to this litigation occurred in 1994, some two years before the CDA was signed into law and became effective on February 8, 1996. This lawsuit was filed January 23, 1997. The determination of whether Section 230 is to be given retroactive application to this lawsuit begins and ends with the analysis set forth by this Court in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

Historically, this Court has remained suspicious of attempts to apply statutes to situations which predate a statute's enactment. *"The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen."* (Emphasis Added.) *Lynce v. Mathis*, 519 U.S. 433, 439 (1997). The presumption against retroactive application of new laws "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our

Republic." *Lynce, at 439 citing Landgraf,* 511 U.S. at 265 (1994).

Under the *Landgraf* analysis, the Courts must ask first whether Congress has expressly prescribed the statute's proper reach. If there is no congressional directive on the temporal reach of Section 230, then the Courts determine whether the application of that Section to the conduct at issue would result in a retroactive effect. If so, then in keeping with this Court's "traditional presumption" against retroactivity, the Courts should find that the Section 230 does not apply to that conduct.

Contrary to the majority opinion of the Florida Supreme Court below (following the lead of the 4th Circuit in *Zeran*), Congress has not expressly mandated the temporal reach of Section 230. The relevant subsection of Section 230 provides:

> (3) *State law.* Nothing in this section shall be construed to prevent any State from enforcing any State Law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section. 47 U.S.C. § 230(d)(3).

AOL contends (and the Florida Supreme Court below agreed) that this language, particularly the phrase "No cause of action may be *brought*" (emphasis added), clearly expresses a congressional intent that Section 230 apply to pending cases, even if the case is based on conduct that occurred before Section 230 was enacted. Doe submits that this subsection merely defines the effect that the Act would have on State actions and does not purport to define the temporal reach of Section in general.

This language falls short of demonstrating a "clear congressional intent" favoring retroactive application as required by *Landgraf*. It falls short, in other words, of the "unambiguous directive" or "express command" that the statute is to be applied retroactively. *Landgraf*, at 263, 280. There is nothing in the language of Section 230(d)(3) that *clearly* evidences an intent to apply the Act retroactively. Had Congress intended the Act to apply retroactively, they could have said so.

In fact, the language at issue herein is strikingly similar to the statutory language analyzed by this Court in *Martin v. Hadix*, 527 U.S. 343 (1999). In that case, the relevant language of the statute read: "[i]n any action *brought* by a prisoner who is confined [to a correctional facility] . . . attorney's fees . . . shall not be awarded, except as authorized by the statute" (emphasis added). Justice O'Connor, writing for the majority, noted that the term "brought," as used in this section, is not a past-tense verb but rather is the participle in a participial phrase modifying the noun "action". Therefore, this Court found that the language at issue in *Martin* fell short of demonstrating a "clear congressional intent" favoring retroactive application.

When the proper determination is made that Congress has not expressly prescribed the proper reach of Section 230, the second question in the *Landgraf* analysis is whether application of this section in this case would have retroactive effects inconsistent with the usual rule that legislation is deemed to be prospective. The inquiry into whether a statute operates retroactively demands a common sense, functional judgment about "whether the new provision attaches new legal consequences to events completed before its enactment". *Landgraf*, at 270. This judgment should be informed and guided by "familiar

considerations of fair notice, reasonable reliance, and settled expectations." *Ibid.*

Clearly, Section 230 attached new legal consequences to the actions or inactions of AOL and other online service providers. Doe had reasonably relied on the common law that had developed relative to the liability of online service providers and had chosen, in order to lessen the trauma of a civil proceeding to the minor child, chose to wait until the criminal prosecution and subsequent sentencing of Russell, the third-party tortfeasor, was resolved. Upon completion of the criminal prosecution of co-defendant Russell, Doe then went forward with this lawsuit. By the time the Complaint was filed, the CDA had been recently enacted. Had Doe known that the law should suddenly change and effectively bar her cause of action against AOL, Doe would have taken a more aggressive approach and filed her suit earlier. This type of retroactive effect is the precise type of negative outcome that this Court, in *Landgraf*, was protecting against.

In conclusion, the text, legislative history, and purpose of Section 230 do not evince a clear congressional intent to apply Section 230 retroactively and this Court, as it did in *Landgraf*, should grant the Petition, apply the traditional presumption against retroactive application and put an end to the misguided interpretations of the Florida Supreme Court and the 4th Circuit.

III. THE FLORIDA SUPREME COURT ERRED IN FINDING THAT CONGRESS INTENDED TO PREEMPT STATE LAW BY BARRING CLAIMS BROUGHT ON THEORIES OF DISTRIBUTOR LIABILITY AS WELL AS THOSE BROUGHT ON THEORIES OF PUBLISHER LIABILITY

The courts have traditionally drawn a distinction between publisher liability and distributor liability, first in the context of the traditional information provider such as a bookstore or library[2], and then with the ever increasing development of technology, in the context of online service providers.

The standard of liability for online service providers begins with the decision in *Cubby, Inc. v. CompuServe*, 776 F. Supp. 135 (S.D.N.Y. 1991). In *Cubby*, the online service provider, CompuServe, was found not to be liable for defamatory statements posted on its service, absent a showing that it either knew or had reason to know of the defamation. The *Cubby* court stated that "Given the relevant First Amendment considerations, the appropriate standard of liability to be applied to CompuServe is whether it knew or had reason to know of the allegedly defamatory Rumorville statements." *Id.* at 140.

The *Cubby* court based their decision upon the scienter requirement as established by this Court in *Smith v. California*, 361 U.S. 147 (1959). Citing *Smith*, the *Cubby* court stated "knowledge of the contents is deeply rooted in the First Amendment, made applicable to the states through the 14th Amendment." *Id.* at 139. In *Smith*, this Court found that a bookstore could be liable for the content of its books if the bookstore had knowledge, actual or constructive, of the contents of the book. Thus,

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[2] *Smith v. California*, 361 U.S. 147 (1959).

Cubby and *Smith* announced that the standard of liability for distributors of content is that a distributor must have knowledge of the damaging contents of a publication before liability can be imposed for distributing that publication.

In 1995, the Superior Court of New York, in its decision in *Stratton-Oakmont v. Prodigy Service Co., Inc.*, 1995 WL 323710 (Sup.Ct. N.Y. May 24, 1995), took the standard of liability for online service providers to a new level. The court moved away from the *Smith* and *Cubby* line of cases which required knowledge as a prerequisite to imposing liability upon a distributor of information and held that a distributor should be held strictly liable, akin to a publisher, to the extent that the distributor was prescreening and conducting editorial control of the content on its service.

In *Stratton-Oakmont*, the court found the distributor strictly liable for false information published within its computer bulletin boards not because it had knowledge of the content but merely because they had exercised editorial control over the content. Such is not the case here.

When Congress enacted Section 230 of the CDA, it specifically addressed the strict liability standard set forth in the *Stratton-Oakmont* decision.[3] They did not, however, mention or specifically overrule *Cubby* or *Smith*.

---

[3] The Conference Report to the CDA states as follows:

"One of the specific purposes of [Section 230] is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material." H.R. Conf. Rep. No. 104-458, at 194 (1996).

Thus, in enacting the "Good Samaritan Blocking and Screening" portion of Section 230, Congress left intact the *Cubby* and *Smith* standard which imposes distributor liability with actual or constructive notice. Allowing distributor liability where the distributor of content has knowledge of the damaging material is entirely consistent with the CDA. Furthermore, Congress did not expressly or impliedly preempt the imposition of distributor liability on online service providers and Section 230 expressly retains state actions that are consistent with the Act.

If Congress had intended the CDA to give immunity to distributors, it would have said so. Furthermore, the legislative history would have referenced an intent on the part of Congress to overrule *Cubby* and *Smith* and it does not do so. Presumably, members of Congress were as aware of *Cubby* and *Smith* as they were of *Stratton-Oakmont*, and the fact that they did not mention *Cubby* and *Smith* in their Conference Report (App. A-8), indicates their intention to leave the decisions in those cases intact. The language of Section 230(c) specifically limits itself to publisher or speaker immunity and does not provide immunity to distributors. This again, evidences an intent on the part of Congress to not provide immunity to distributors, as contemplated by the *Cubby* and *Smith* decisions.

The use of "good faith" language suggests that the knowledge requirement is still viable under the CDA. Failing to act while retaining full knowledge that your system is being used to market and distribute child pornography cannot be understood to be a "good faith effort." If Congress had intended to give the Defendant blanket immunity, there would be no need to include the wording "good faith."

The theory of liability which Doe alleges against AOL is not rooted in the contents of the message that Russell sent over AOL's service but rather is rooted in the conduct of Russell and AOL's failure to prohibit such conduct and does not require a showing that the message was published. Moreover, Doe's Complaint does not seek to hold AOL liable as a publisher or speaker of information, but rather as a distributor of information and/or an active conduit of and participant in criminal conduct and accordingly, the courts below erroneously found immunity and preemption under Section 230(c).

Despite the express limit of the congressional protection and the express purposes of Section 230, the Florida Supreme Court has extended the limitation of publisher liability to create a judicial safe haven to shield online service providers from civil liability when they participate in the distribution of child pornography. The ruling of the Florida Supreme Court reflects a disregard of the legislative text and intent of the CDA and a departure from the preemption principles enunciated by this Court. Ultimately, the ruling is an impermissible incursion into the legislative domain of Congress and it should be reversed.

In order to find implied preemption on the basis of a conflict of the state tort action with the language of the CDA, the Florida Supreme Court has essentially snubbed the longstanding distinction between publishers and distributors recognized both in the civil law of defamation and in the criminal law of trafficking in obscenity. The holding of the Florida Supreme Court presupposes that the traditional common law and statutory distinction between distributor liability and publisher liability is without substance and was eradicated by the Act.

This Court should grant the Petition, clarify the distinction between distributor and publisher liability and reinstate the standard of liability of *Smith* and *Cubby* as it applies to online service providers, consistent with the intent of Section 230 to only preempt causes of action based on publisher liability.

CONCLUSION

The pernicious ramifications of this unprecedented and unauthorized blanket immunity granted to AOL and other online service providers are staggering. The Florida Supreme Court's misinterpretation of the CDA leaves Doe without any means to redress the purposeful, illegal and injurious acts of AOL. Congress' limited grant of publisher immunity to online service providers was not intended to foreclose all state tort actions against online service providers but this is the effect of the ruling of the Florida Supreme Court. The ruling of the Florida Supreme Court not only violates the terms and purpose of the Act itself but it is an affront to the recognized parameters of federal preemption and the traditional limits of immunity. For these and other reasons set forth herein, Doe prays that this Court will grant her Petition.

Respectfully submitted,

LLOYD J. HEILBRUNN
Of Counsel
4400 PGA Blvd
Suite 700
Palm Beach Gardens, FL
33410

BRIAN W. SMITH
Counsel of Record
360 Columbia Drive
Suite 102
West Palm Beach, FL 33409
(561) 684-6330

Attorneys for Petitioner

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APPENDIX 1

Supreme Court of Florida.

Jane DOE, mother and legal guardian of John Doe, a minor, Petitioner,

v.

AMERICA ONLINE, INC., Respondent.

No. SC94355.

March 8, 2001.
Rehearing Denied April 20, 2001.

Brian W. Smith, West Palm Beach, FL, for Petitioners.

L. Martin Reeder, Jr. of Steel, Hector and Davis, West Palm Beach, FL; and Patrick J. Carome and Samir Chandra Jain of Wilmer, Cutler & Pickering, Washington, DC, for Respondent.

WELLS, C.J.

We have for review *Doe v. America Online, Inc.*, 718 So.2d 385 (Fla. 4th DCA 1998), in which the Fourth District Court of Appeal certified the following questions to be of great public importance:

> [1] Whether section 230 of the Communications Decency Act [CDA] applies to complaints filed after its effective date where the complaint alleges a cause of action based upon acts occurring prior to its effective date?
>
> [2] If the answer [to question 1] is in the affirmative, whether section 230 of the Communications Decency Act preempts Florida law?
>
> [3] Whether a computer service provider with notice of a defamatory third party posting is entitled to immunity under section 230 of the Communications Decency Act?

718 So.2d at 390. We have jurisdiction. Art. V, § 3(b)(4), Fla. Const.

FACTS AND PROCEDURAL HISTORY

Doe filed a complaint in 1997 against Richard Lee Russell and America Online (AOL), an Internet service provider (ISP), to recover for alleged emotional injuries suffered by her son, John Doe. Doe claimed that in 1994 Russell lured John Doe, who was then eleven years old, and two other minor males to engage in sexual activity with each other and with Russell. She asserted that Russell photographed and videotaped these acts and used AOL's "chat rooms" to market the photographs and videotapes and to sell a videotape. Doe did not allege that Russell transmitted photographs or images of her son via the AOL service. In her six-count complaint, Doe claimed that AOL violated criminal statutes, section 847.011[1] and section 847.0135(2), Florida Statutes (1993).[2]

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[1] Section 847.011(1)(a), Florida Statutes (1993), provides in relevant part:

> Any person who knowingly . . . distributes . . . or offers to sell . . . any obscene . . . photograph . . . [or] image . . . is guilty of a misdemeanor of the first degree. . . .

[2] Section 847.0135(2), Florida Statutes (1993) (Computer Pornography and Child Exploitation Prevention Act of 1986), provides in relevant part:

> COMPUTER PORNOGRAPHY. – A person is guilty of a violation of this section if he knowingly . . . transmits by means of computer, or makes, prints, publishes, or reproduces by other computerized means, or knowingly causes or allows

She alleged that AOL was negligent per se in violating section 847.0135, Florida Statutes, by allowing Russell to distribute an advertisement offering "a visual depiction of sexual conduct involving [John Doe]" and by allowing Russell to sell or arrange to sell child pornography, thus aiding in the sale and distribution of child pornography, including obscene images of John Doe. Doe asserted a separate claim for negligence based on the allegation that AOL knew or should have known that Russell and others like him used the service to market and distribute child pornography; that it should have used reasonable care in its operation; that it breached its duty; and that the damages to John Doe were reasonably foreseeable as a result of AOL's breach. Doe further claimed that complaints had been communicated to AOL as to Russell's transmitting obscene and unlawful photographs or images and that although AOL reserved the right to terminate without notice the service of any member who did not abide by its "Terms of Service and Rules of the Road," AOL neither warned Russell to stop nor suspended his service.Two of the counts in Doe's complaint were directed at Russell.[3]

> to be entered into or transmitted by means of computer, or buys, sells, receives, exchanges, or disseminates any notice, statement, or advertisement, or any minor's name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information, for purposes of facilitating, encouraging, offering, or soliciting sexual conduct of or with any minor, or the visual depiction of such conduct.

[3] The record reflects that Russell is presently serving lengthy federal and state prison sentences arising out of events relating to those alleged in the complaint. Russell pled guilty

AOL moved to dismiss Doe's complaint and argued, inter alia, that Doe's claims were barred by 47 U.S.C. § 230 (Supp. II 1996),[4] in that section 230 prohibits civil actions that treat an interactive computer service as the

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and was convicted on federal criminal charges of sexual exploitation of children and transportation of sexually explicit material involving a minor and state criminal charges of attempted sexual battery.

[4] 47 U.S.C. § 230 provides in relevant part:

> (c) Protection for "Good Samaritan" blocking and screening of offensive material
>
> (1) Treatment of publisher or speaker
>
> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
>
> (2) Civil liability
>
> No provider or user of an interactive computer service shall be held liable on account of –
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).
>
> (d) Effect on other laws
>
> (1) No effect on criminal law
>
> Nothing in this section shall be construed to impair the enforcement of section 223 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual

"publisher or speaker" of messages transmitted over its service by third parties.[5] The trial court granted AOL's motion to dismiss with prejudice, finding that the immunity Congress provided for interactive computer services in section 230 applied to Doe's claims. The Fourth District Court of Appeal affirmed and held that the trial court's conclusion was consistent with *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir.1997), in which the federal circuit court held that "Congress' desire [in enacting 47 U.S.C. § 230] to promote unfettered speech must supersede conflicting common law causes of action." *Id.* at 334.

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exploitation of children) of Title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

[5] Section 230 defines "interactive computer service" as: [A]ny information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

47 U.S.C. § 230(e)(2).

The statute defines "information content provider" as: [A]ny person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

47 U.S.C. § 230(e)(3).

The Fourth District certified the questions of great public importance to this Court.

SECOND AND THIRD CERTIFIED QUESTIONS

The certified questions in this case focus upon the application of 47 U.S.C. § 230 to Florida tort actions that are based upon alleged "distributor" liability of ISPs. We first address the Fourth District's second and third certified questions and rephrase them into this combined question:

> Whether section 230 preempts Florida law as to causes of action based in negligence against an Internet Service Provider (ISP) as a distributor of information allegedly in violation of Florida criminal statutes prohibiting the distribution of obscene literature and computer pornography?

For the purpose of answering the certified question, but without deciding, we accept that the complaint in this case states a cause of action under Florida law[6] for liability in negligence against AOL as a distributor of information. We answer the rephrased certified question in the affirmative and find that section 230 does preempt Florida law as to such a cause of action based upon alleged negligence. We find persuasive the reasoning of the United States District Court in *Zeran v. America Online,*

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[6] We accept that the allegations are based upon information distributor liability in accord with section 581 of the Second Restatement of Torts (1977) and as impliedly recognized in *Cardozo v. True,* 342 So.2d 1053, 1056 (Fla. 2d DCA 1977), and based upon a statutory violation under *deJesus v. Seaboard Coast Line Railroad Co.,* 281 So.2d 198, 201 (Fla.1973).

Inc., 958 F.Supp. 1124, 1131-37 (E.D.Va.1997), and the Fourth Circuit in *Zeran*, 129 F.3d at 331-32.

The importance of this certified question is obvious in light of the current explosive growth in worldwide use of the Internet. The fundamental issue here is whether companies that provide access to the Internet are subject to common-law civil tort causes of action based upon the laws of each of the fifty states or whether Congress has acted to make ISPs immune from such common-law civil actions.

In reaching our conclusion, we find instructive the analysis of the congressional adoption of section 230 that was provided in the *Zeran* decisions and in commentaries concerning the *Zeran* decisions.[7] These sources indicate that two reported judicial decisions from courts in the State of New York were significant in congressional passage of 47 U.S.C. § 230, the Communications Decency Act (CDA), and thus provide assistance in understanding the intent of the Act. The cases are *Cubby, Inc. v. CompuServe, Inc.*, 776 F.Supp. 135 (S.D.N.Y.1991), and *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. 1794, 1995 WL 323710 (N.Y.Sup.Ct.1995). In *Cubby*, the federal district court held in a defamation action that CompuServe, a service provider that offered its subscribers

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[7] Steven M. Cordero, Comment, *Damnum Absque Injuria: Zeran v. AOL and Cyberspace Defamation Law*, 9 Fordham Intell. Prop. Media & Ent. L.J. 775 (1999); Annemarie Pantazis, *Zeran v. America Online, Inc.: Insulating Internet Service Providers from Defamation Liability*, 34 Wake Forest L.Rev. 531 (1999). *See also Ben Ezra Weinstein Co. v. America Online Inc.*, 206 F.3d 980, 985-86 (10th Cir.2000); *Does v. Franco Productions*, No. 99C7885, 2000 WL 816779 (N.D.Ill. June 22, 2000).

access to an electronic library of news publications, was a mere distributor of information and could not be held liable for libelous statements made in news publications without a showing of actual knowledge. *See* 776 F.Supp. at 140-41.

Subsequent to the federal *Cubby* decision, a New York state court decided *Stratton Oakmont* and concluded that an ISP could be held liable as a publisher of defamatory statements *if* the ISP retained editorial control over the postings contained on its site. *See* 23 Media L. Rep. at 1798, 1995 WL 323710. According to one commentator, this created a paradox in that those ISPs who tried to control what was placed on the Internet so as to limit access "to provide decent, family-oriented content [would be] subject to defamation lawsuits and liability on account of their efforts, while [ISPs] who made no efforts to control content would be free of liability."[8]

In 1996, Congress enacted 47 U.S.C. § 230, which was adopted as Title V of the Telecommunications Act of 1996, Pub.L. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of 15 and 47 U.S.C.). *See Reno v. ACLU*, 521 U.S. 844, 859 n. 24, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). The Congressional Conference Report on section 230 specifically states:

> [T]his section provides "Good Samaritan" protections from civil liability for providers or users of an interactive computer service for actions to restrict or enable restriction of access to objectionable online material. . . . [O]ne of the specific purposes of [section 230] is to overrule *Stratton-*

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[8] Cordero, *supra* note 7, at 792.

> *Oakmont [Stratton Oakmont] v. Prodigy* and any other similar decisions which have treated such providers and users as Publishers or speakers of content that is not their own because they have restricted access to objectionable material.

Cordero, *supra* note 7, at 795 (quoting S. Conf. Rep. No. 104-230, at 435 (1996)).

In *Zeran*, the Fourth Circuit described this history of section 230:

> Another important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services. In this respect, § 230 responded to a New York state court decision, *Stratton-Oakmont [Stratton Oakmont], Inc. v. Prodigy Servs. Co.* There, the plaintiffs sued Prodigy – an interactive computer service like AOL – for defamatory comments made by an unidentified party on one of Prodigy's bulletin boards. The court held Prodigy to the strict liability standard normally applied to original publishers of defamatory statements, rejecting Prodigy's claims that it should be held only to the lower "knowledge" standard usually reserved for distributors. The court reasoned that Prodigy acted more like an original publisher than a distributor both because it advertised its practice of controlling content on its service and because it actively screened and edited messages posted on its bulletin boards.
>
> Congress enacted § 230 to remove the disincentives to self-regulation created by the *Stratton Oakmont* decision. Under that court's holding, computer service providers who regulated the

> dissemination of offensive material on their services risked subjecting themselves to liability, because such regulation cast the service provider in the role of a publisher. Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, Congress enacted § 230's broad immunity "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." § 47 U.S.C. § 230(b)(4). In line with this purpose, § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.
>
> *Zeran*, 129 F.3d at 331 (citation omitted).

Using this history as a basis for our reading of section 230, we turn to the issue of preemption of Florida law. The reasoning of the United States District Court in *Zeran* is incisive and directly on point on this issue:

> 2. Conflict with the Language of the CDA
>
> Preemption is also required where state law conflicts with the express language of a federal statute. In this case, Zeran seeks to hold AOL liable for its alleged negligence in allowing the bogus notices to remain and reappear after learning of their fraudulent nature from Zeran. This theory of liability derives chiefly from *Cubby*, a case decided over four years before the passage of the CDA. In *Cubby*, the district court concluded that the defendant interactive computer service, CompuServe, was a distributor for the purposes of defamation liability, and thus was liable only if it "knew or had reason to

know of the alleged defamatory . . . statements." This "reason to know" standard is consistent with the standard of liability for entities such as news vendors, book stores, and libraries who, while not charged with a duty to review the materials they distribute, are liable if they distribute materials they know or have reason to know contain defamatory statements. Thus, Zeran contends that on learning of the fake notice on the AOL bulletin board advertising the tasteless T-shirts, AOL had a duty to take reasonable steps to prevent the distribution of this posting. Zeran further contends that the scope of this reasonable duty, and whether AOL complied with it, are questions for a jury.

AOL responds by contending that a state cause of action for distributor liability is preempted because it directly conflicts with the language of § 230 of the CDA. Specifically, AOL points to § 230(c)(1), which states that

[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

Zeran does not contest that AOL is an interactive computer service as defined by the CDA and it is clear that AOL meets the statutory definition of such a service. Nor does Zeran claim that the bogus notices were anything but "information provided by another information content provider." *Thus, the preemption issue reduces to the question whether a state cause of action for negligent distribution of defamatory material directly conflicts with the CDA's prohibition against treating an Internet provider as a "publisher or speaker." Put another way, the question is*

whether imposing common law distributor liability on AOL amounts to treating it as a publisher or speaker. If so, the state claim is preempted.

The key to answering this question lies in understanding the true nature of so-called distributor liability and its relationship to publisher liability. At the heart of Zeran's argument is the premise that distributor liability is a common law tort concept different from, and unrelated to, publisher liability. *This is not so; distributor liability, or more precisely, liability for knowingly or negligently distributing defamatory material, is merely a species or type of liability for publishing defamatory material.* This relationship is apparent from the Restatement (Second) of Tort § 577 definition of "publication" of defamatory material, which states,

(1) Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed.

(2) One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.

Thus, a publisher is not merely one who intentionally communicates defamatory information. Instead, the law also treats as a publisher or speaker one who fails to take reasonable steps to remove defamatory statements from property under her control.

. . . .

3. Conflict with the Purposes and Objectives of the CDA

An alternative basis for preemption exists if subjecting AOL to state law distributor liability would stand "as an obstacle to the accomplishment of the full purposes and objectives of Congress" in passing § 230 of the CDA. Section 230 itself provides some insight into Congress' purposes and objectives in passing that provision, stating, in part, that

It is the policy of the United States:

. . . .

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; [and]

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material. . . . 47 U.S.C. § 230(b). The scant legislative history reflects that the "disincentive" Congress specifically had in mind was liability of the sort described in *Stratton Oakmont*. There, Prodigy, an interactive computer service provider, was held to have published the defamatory statements of a third party in part because Prodigy had voluntarily engaged in some content screening and editing and therefore knew or should have known of the statements. Congress, concerned that such rulings would induce interactive computer services to refrain from editing or blocking content, chose to grant immunity to interactive computer service providers from suits arising from efforts by those providers to screen or block content. Thus, Congress' clear objective in passing § 230 of the

> CDA was to encourage the development of technologies, procedures and techniques by which objectionable material could be blocked or deleted either by the interactive computer service provider itself or by the families and schools receiving information via the Internet. If this objective is frustrated by the imposition of distributor liability on Internet providers, then preemption is warranted. Closely examined, distributor liability has just this effect.

Zeran, 958 F.Supp. at 1132-35 (citations and footnotes omitted) (emphasis added).

This view was confirmed by the analysis of the Fourth Circuit Court of Appeal in *Zeran:*

> Because of the difference between these two forms of liability, Zeran contends that the term "distributor" carries a legally distinct meaning from the term "publisher." Accordingly, he asserts that Congress' use of only the term "publisher" in § 230 indicates a purpose to immunize service providers only from publisher liability. He argues that distributors are left unprotected by § 230 and, therefore, his suit should be permitted to proceed against AOL. We disagree. Assuming *arguendo* that Zeran has satisfied the requirements for imposition of distributor liability, this theory of liability is merely a subset, or a species, of publisher liability, and is therefore also foreclosed by § 230.
>
> The terms "publisher" and "distributor" derive their legal significance from the context of defamation law. Although Zeran attempts to artfully plead his claims as ones of negligence, they are

indistinguishable from a garden variety defamation action. Because the publication of a statement is a necessary element in a defamation action, only one who publishes can be subject to this form of tort liability. Restatement (Second) of Torts § 558(b) (1977); Keeton et al., *supra*, § 113, at 802. Publication does not only describe the choice by an author to include certain information. In addition, *both the negligent communication of a defamatory statement and the failure to remove such a statement when first communicated by another party – each alleged by Zeran here under a negligence label – constitute publication.* Restatement (Second) of Torts § 577; *see also Tacket v. General Motors Corp.*, 836 F.2d 1042, 1046-47 (7th Cir.1987). *In fact, every repetition of a defamatory statement is considered a publication.* Keeton et al., *supra*, § 113, at 799.

In this case, AOL is legally considered to be a publisher. "[E]very one who takes part in the publication . . . is charged with publication." *Id.* Even distributors are considered to be publishers for purposes of defamation law:

> Those who are in the business of making their facilities available to disseminate the writings composed, the speeches made, and the information gathered by others may also be regarded as participating to such an extent in making the books, newspapers, magazines, and information available to others as to be regarded as publishers. They are intentionally making the contents available to others, sometimes without knowing all of the contents – including the defamatory

> content – and sometimes without any opportunity to ascertain, in advance, that any defamatory matter was to be included in the matter published.

Id. at 803. AOL falls squarely within this traditional definition of a publisher and, therefore, is clearly protected by § 230's immunity.

Zeran, 129 F.3d at 331-32 (emphasis added). It is precisely the liability based upon negligent failure to control the content of users' publishing of allegedly illegal postings on the Internet that is the gravamen of Doe's alleged cause of action. Such publication of obscene literature or computer pornography is analogous to the defamatory publication at issue in the *Zeran* decisions. Therefore, our agreement with the reasoning of the federal district court answers the certified question as to preemption. Accordingly, we answer the combined and rephrased certified question in the affirmative.

FIRST CERTIFIED QUESTION

We next turn to the first certified question, which is whether section 230 applies to complaints filed after its effective date where the complaint alleges a cause of action based upon acts occurring prior to its effective date. Again, we find to be correct the reasoning of the United States District Court in *Zeran:*

> Zeran contends that even if the CDA preempts a state law cause of action for negligent distribution of defamatory statements, it cannot have that effect here without violating the stricture against retroactive application of statutes. The

CDA was signed into law and became immediately effective on February 8, 1996, over nine months after the posting of the bogus notices that form the basis of Zeran's claims against AOL. Yet, Zeran did not file this complaint until April 1996, two months after the CDA went into effect. This, then, is a case brought after a statute's enactment but based on facts that occurred prior to its enactment. In these circumstances, a statute may not have a "retroactive effect" absent a clear expression of congressional intent with respect to such retroactivity. *See Landgraf v. USI Film Products*, 511 U.S. 244, 280-81 [, 114 S.Ct. 1483, 128 L.Ed.2d 229] (1994). Thus, a court must first determine whether Congress has clearly expressed the statute's intended temporal reach. If so, the judicial inquiry is complete and Congress' clear intent must be implemented. *Id.* If, on the other hand, the statute has no express Congressional command with respect to its temporal application, courts must undertake a second inquiry to determine whether the application of the statute will result in a prohibited "retroactive effect." *Id.* In this case, the first step is dispositive, Congress has made its intent manifest.

Section 230 clearly reflects Congress' intent to apply the CDA to all suits filed after its enactment, notwithstanding when the operative facts arose. Thus, in § 230(d)(3), the CDA provides, in pertinent part, that

[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

> *This subsection does not generally refer to conflicting state laws having "no effect" or being "preempted." To the contrary, it specifically provides that "[n]o causes of action may be brought." And such clear statutory language cannot reasonably be construed to mean that only some causes of action may be brought, namely those concerning events arising before the enactment of the CDA.*

Zeran, 958 F.Supp. at 1135-37 (citations and footnotes omitted) (emphasis added).

We specifically concur that section 230 expressly bars "any actions" and we are compelled to give the language of this preemptive law its plain meaning. We therefore concur with the Fourth District Court of Appeal in its holding that Doe's cause of action against AOL is barred by the plain language of section 230(d)(3).

Accordingly, for the reasons expressed, we answer in the affirmative the first certified question and the rephrased question, which combines the second and third certified questions, and approve the decision of the Fourth District below.

It is so ordered.

SHAW, HARDING and ANSTEAD, JJ., concur.

LEWIS, J., dissents with an opinion, in which PARIENTE and QUINCE, JJ., concur.

LEWIS, J., dissenting.

I understand that it may be somewhat attractive for the majority to follow an existing published opinion from a different jurisdiction; however, I conclude that, because the analysis upon which it is based is faulty and leads to

a totally unacceptable interpretation, it should not be followed.[9] Therefore, I dissent.

It is clear that Congress, through the Communications Decency Act, 47 U.S.C. § 230 (the "CDA"), intended to shield an Internet Service Provider (an "ISP") from liability due solely to implementation of a good-faith monitoring program whose goal is to preclude dissemination of illicit and improper materials through the ISP's electronic medium. Contrary to the majority's view, however, the carefully crafted statute at issue, undergirded by a clear legislative history, does not reflect an intent to totally exonerate and insulate an ISP from responsibility where, as here, it is alleged that an ISP has acted as a knowing distributor of material leading to the purchase, sale, expansion and advancement of child pornography, after having been given actual notice of the particular activity, by taking absolutely no steps to curtail continued dissemination of the information by its specifically identified customer, when it had the right and power to do so.

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[9] *See generally Gross v. State*, 765 So.2d 39 (Fla.2000) (observing that, where there is no uniform interpretation by the various federal circuits regarding the interpretation of a federal statute, the approach used by any particular federal circuit is merely persuasive and not binding); *Corporate Securities Group v. Lind*, 753 So.2d 151, 152 (Fla. 4th DCA 2000) (explaining that, where a state appellate court is asked to decide a federal question as to which there is no Supreme Court authority directly on point, and no unified position has been established in the Circuit Courts of Appeal, the state court is obligated to decide the issue by projecting "what the [United States] Supreme Court would do if and when it ultimately confront[s] the question").

In my view, the result obtained by this Court's interpretation of congressional intent in this area frustrates the core concepts explicitly furthered by the Act and contravenes its express purposes. Through the majority's interpretation, the so-called "Decency Act" has, contrary to well-established legal principles, been transformed from an appropriate shield into a sword of harm and extreme danger which places technology buzz words and economic considerations above the safety and general welfare of our people.

I suggest that by interpreting the statute to provide this carte blanche immunity for wrongful conduct plainly not intended by Congress, the majority view ignores the common law underpinnings of the present controversy; fails to accommodate the traditional distinction between publishers and distributors consistently recognized in American jurisprudence; overlooks the historical timing of the subject legislation in the context of developing case law; excludes proper analysis of the careful wording of the subject legislation; and does not consider the obvious intent additionally underscored by Congress both in the stated policies underlying the statute, and in the statute's legislative history. These grounds, collectively – coupled with the rationale of the very case which the majority deems controlling – warrant a far different result.

In *Zeran* (as quoted in the majority opinion), the Fourth Circuit began by explaining what Congress had intended when it enacted the Communications Decency Act, 47 U.S.C. § 230. The legislation was aimed at removing "disincentives for the development and utilization of blocking and filtering technologies that empower parents

to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. § 230(b)(4). Specifically, Congress enacted the CDA as a measure to "overrule *Stratton Oakmont v. Prodigy* and other similar decisions which have treated such providers and users *as Publishers or speakers* of content that is not their own *because they have restricted access to objectionable material.*" S. Conf. Rep. No. 104-230 at 435 (1996).

I submit that, with this predicate, a correct understanding of the *Stratton Oakmont* decision is thus key to a proper analysis here. In *Stratton Oakmont,* the court had held Prodigy, an interactive computer service like AOL, *"to the strict liability standard* normally *applied to original publishers* of defamatory statements, *rejecting Prodigy's claims that it should be held only to the lower 'knowledge' standard usually reserved for distributors.* The court reasoned that *Prodigy acted more like an original publisher than a distributor* both because it advertised its practice of controlling content on its service and *because it actively screened and edited messages posted on its bulletin boards." Zeran v. America Online, Inc.,* 129 F.3d 327, 331 (4th Cir.1997) ((emphasis quoted) *quoted in* majority op. *supra* p. 1014-15) (emphasis supplied). While the initial foray into *Zeran*'s analysis is thus promising, its eventual conclusion – and thus, the majority's corresponding conclusion in this case, patterned on the analyses contained in the two *Zeran* decisions – is, in my view, a startling non sequitur. Contrary to case law[10] which has traditionally

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[10] Although the conduct and wrong alleged here may be far more egregious than defamation and involve other considerations, such is probably the most appropriate analogy

recognized an important difference between distributor and publisher liability, the majority opinion rejects any such distinction, relying on the Restatement (Second) of Torts § 577 – a venerable treatise published in 1977[11] – for

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found in our common law as to the status of the participants. *Compare Miami Herald Pub. Co. v. Ane*, 458 So.2d 239 (Fla.1984) (holding that, under Florida law, it is sufficient for a non-public figure plaintiff to establish, in a defamation action, that the defendant newspaper published the alleged false and defamatory statements with negligence, *i.e.*, without reasonable care as to whether the alleged false and defamatory statements were actually true or false) *with Sexton v. American News Co.*, 133 F.Supp. 591, 593 (N.D.Fla.1955) (recognizing that a newspaper vendor may avoid liability by showing that "he neither knew nor ought to have known that the paper he was selling contained libelous matter"), *cited in Cardozo v. True*, 342 So.2d 1053, 1056 (Fla. 2d DCA 1977) (examining, in the context of a tort action against the distributor of a cook book for personal injuries allegedly suffered as a result of inadequate warnings contained therein, the "closely analogous" principle that "distributors of newspapers and periodicals cannot be even held legally responsible for defamatory material contained therein where the dealer did not know and reasonably could not have known that the publication contained defamatory material"); *see generally* R. James George, Jr. & James A. Hemphill, *Defamation Liability and the Internet*, 507 Prac. L. Inst. 691, 694 (1998) ("The 'publisher/distributor' distinction has existed for years in the common law of libel.").

[11] While the general common law tort principles contained in the Restatement are, of course, still viable, the treatise has yet to incorporate the realities of the World Wide Web. As observed by the author of a 1996 law review article who attempted to reconcile *Cubby* with *Stratton Oakmont*, "Megabyte. Mouse. E-mail. CD-ROM. Hard drive. Multimedia. World Wide Web. Five years ago, these were words that few in the population understood, let alone used in conversation." Matthew C. Siderits, Comment, *Defamation in Cyberspace: Reconciling Cubby,*

the proposition that "the law *treats as a publisher or speaker* one who fails to take reasonable steps to remove

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Inc. v. Compuserve, Inc. and Stratton Oakmont v. Prodigy Services Co., 79 Marq. L.Rev. 1065, 1081 (1996) (concluding that, "[a]lthough some may argue that on-line services act as publishers, the proper standard to apply to on-line services is the distributor framework"); *see also* Yochai Benkler, *Net Regulation: Taking Stock and Looking Forward*, 71 U. Colo. L.Rev. 1203, 1205 (observing that "[t]he concept of regulating the Net – in the lawmaking or regulatory sense, rather than engineering sense – did not exist prior to the 1990s because "the Net" did not yet exist as a society-wide communications medium"). Although the treatment of defamation in the 1977 edition of the Restatement of Torts encompasses radio and television, *see* § 581, Restatement (Second) of Torts (1977), it has yet to address the role of Internet presences. This would appear to be particularly apt in light of the multiple functions which the Internet now serves, including, for example, the recent publication of a Stephen King book directly on the Internet. *See* http://www.stephenking.com/sk_120400_2.html (reflecting Stephen King's commentary regarding his recent on-line publication of *The Plant*, which King described as "an epistolary novel set in the early 1980s (before e-mail, in other words, and when even the fax was a fringe technology)," and regarding which, King had advised internet users: "My friends, we have a chance to become Big Publishing's worst nightmare. Not only are we going glueless, look Ma, no e-Book!"). In fact, a search of the Westlaw database of Florida decisions reveals that the word "Internet" did not even appear in Florida case law until 1996. And it was only in 1999 Amendments to the Advertising Rules in the Rules Regulating the Florida Bar that "Internet presences such as home pages or World Wide Web sites, unsolicited electronic mail communications, and information concerning a lawyer's or law firm's services that appears on World Wide Web search engine screens and elsewhere" were first regulated by this Court. *See Amendments to Rules Regulating Florida Bar-Advertising Rules*, 762 So.2d 392, 425 (Fla.1999).

defamatory statements from property under her control." Majority op. at 1016 (quoting *Zeran v. America Online Inc.*, 958 F.Supp. 1124, 1133 (E.D.Va.1997)). However, close examination of the Restatement (Second) itself reflects that this reliance is misplaced, both because it is not clear, from a reading of chapter 24 of the Restatement in its entirety, that section 577(2)[12] is the section which most

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[12] Section 577(2) does not appear to have been cited as persuasive authority in many cases. *Compare Dillon v. Waller*, No. 95APE05-622, 1995 WL 765224 (Ohio Ct.App.1995) (citing § 577(2) as persuasive authority in a defamation case involving lewd language painted on a bus parked on the defendant's property) *and Southern Bell Tel. and Tel. Co. v. Coastal Transmission Service, Inc.*, 167 Ga.App. 611, 307 S.E.2d 83, 85 (1983) (citing § 577(2) in a case involving alleged libel which appeared in a display advertisement in the Southern Bell yellow pages telephone directory which misprinted the plaintiff's slogan, "Get it in gear," as "Get it in rear") *with Dominick v. Sears, Roebuck & Co.*, 741 S.W.2d 290, 294 (Mo.Ct.App.E.D.1987) (refusing to extend liability to the situation before it, which involved a suit for defamation against a department store based upon a credit report issued by a third party which the store maintained, and which contained a defamatory statement made by the third party, observing that "[t]he classic illustration of this rule is the situation of the tavern owner who fails to remove, after knowledge thereof, a libelous statement about plaintiff written by another on a wall in the restroom of his establishment") (citing § 577(2), Illustration 15). Is the function served by the provider of an Internet service "bulletin board" more like that of a physical establishment which maintains a cork bulletin board (which would be covered by § 577(2)), or more like a telephone, ticker, teletype or telegraph company (covered by § 581(1)) which transmits third-party messages for a fee? Since the subject activity involves the transmission of messages through an electronic medium, which can only be sent or received through a telecommunications interconnection for which the customer pays a fee, the latter analogy appears more appropriate.

properly applies to this controversy, and, I suggest, because – even if it were – section 577 does not support the proposition for which it is cited. The fatal flaw in *Zeran*'s logic – and thus, in the majority view – is its erroneous conclusion that, under section 577 of the Restatement of Torts (Second), distributors are merely an internal category of publishers.[13]

My analysis leads to the conclusion that this is not at all what the Restatement reflects. First, distributor liability, which we must address, is defined not in section 577, but in section 581(1) (which appears to apply here). However, assuming arguendo that section 577(2) did define "distributors," it does not reflect that they are a "subset" of primary publishers. Rather, they belong to a set of entities who perform a "secondary role in disseminating defamatory matter authored and published by others." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 113, at 810 (5th ed.1984). In defining publication, the Restatement (Second) provides, in section 577(1), that "[p]ublication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed." In section 577(2), it

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[13] As one legal commentator has observed, the *Zeran* court "based its holding on a questionable interpretation of the word 'publisher,' stating that 'distributor' was merely a subset of the word 'publisher.' " *Developments in the Law – The Law of Cyberspace, III The Long Arm of Cyber-Reach*, 112 Harv. L.Rev. 1574, 1613 & n. 23 (1999) (citing *Zeran*, 129 F.3d at 330-33, and indicating that "a more detailed criticism of the *Zeran* court's verbal gymnastics" can be found in David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act upon Liability for Defamation on the Internet*, 61 Alb. L.Rev. 147, 168-72 (1997)).

provides further that one who "intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control," although not a publisher (as defined in subsection (1)), "is *subject to liability for its continued publication.*" Restatement (Second) of Torts § 577. This is a far different statement than that contained in other parts of chapter 24, which identify different categories of actors as being "subject to liability as if [they] had originally published" the defamatory matter (§ 578), or "subject to the same liability as an original publisher" (§ 581(2)). While a proprietor who fails to remove known defamatory material exhibited on his property may be subject to tort liability,[14] such liability is not that of an original "publisher."

However, it is section 581(1) – involving those who "only deliver or transmit defamation published by a third person" – which more properly defines distributor liability, and which appears most applicable to AOL's activities here. In its entirety, section 581 provides:

> § 581. TRANSMISSION OF DEFAMATION PUBLISHED BY THIRD PERSON
>
> (1) Except as stated in subsection (2), one who only delivers or transmits defamatory matter

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[14] Section 577(2) of the Restatement recognizes potential liability for a proprietor's failure to remove defamatory material on his land or chattels of which he or she is aware: "when, by measures not unduly difficult or onerous, he may easily remove the defamation, he may be found liable if he intentionally fails to remove it." *Dominick v. Sears, Roebuck & Co.*, 741 S.W.2d 290, 294 (Mo.Ct.App.1987) (citing Restatement of Torts (Second) § 577(2) (1977)).

published by a third person *is subject to liability if,* but only if, *he knows* or has reason to know *of its defamatory character.*

(2) One who broadcasts defamatory matter by means of radio or television is subject to the same liability as an original publisher. Thus, under the more appropriate section of the Restatement (Second) of Torts, AOL – *not* as a publisher, but as a distributor ("one who only delivers or transmits defamatory matter published by a third person") – would have potential liability where, as here, it is alleged that AOL actually knew of the illicit character of the material which it was transmitting over its Internet service. *Accord,* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 113, at 810-11 (5th ed.1984). ("It would appear quite clearly that those who perform a secondary role in disseminating defamatory matter authored and published by others in the form of books, magazines and the like – as in the case of libraries, news vendors, distributors, and carriers – would not be subject to liability to anyone in the absence of proof that they knew or had reason to know of the existence of defamatory matter contained in matter published.").

In my view, my colleagues in the majority overlook and fail to consider this distinction between publishers and distributors, which is key to an understanding of what Congress, in 1996, intended to accomplish by enacting the CDA. Five years earlier, in 1991, a federal district court had held, in *Cubby,* that the defendant Internet service provider, CompuServe, was the equivalent of "an electronic, for profit library." 776 F.Supp. at 140. The *Cubby* court had held, therefore, that CompuServe was

entitled to the same first amendment protection as a "distributor," subject to liability only if it knew or had reason to know of the allegedly defamatory statements. The court stated that "CompuServe has no more editorial control over such a publication than does a public library, bookstore, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potential defamatory statements than it would be for any other distributor to do so." *Cubby*, 776 F.Supp. at 140. This finding was both consistent with the function served by the ISP in that case, and with the distinction which, historically, had consistently been made between publishers and distributors. It is not surprising, then, that Congress did not enact the CDA fast on the heels of *Cubby*, nor mention an intent to overrule *Cubby* in the legislative history of the CDA.

However, only shortly before enactment of the CDA, the court in *Stratton Oakmont*, faced with a similar question, reached a far different result. There, the court held that the ISP, Prodigy, would be treated as a "publisher," subject to liability regardless of its actual or imputed knowledge. *See Stratton Oakmont Inc. v. Prodigy Services Co.*, No. 94-31063, 1995 WL 805178, *1 (N.Y.Sup.Ct. May 24, 1995). The *Stratton Oakmont* court distinguished *Cubby* because, unlike Prodigy, CompuServe had no opportunity to review the contents of any publication before it was uploaded. The *Stratton Oakmont* court concluded that, because Prodigy exercised general editorial control over its services, it should be held to the liability of a "publisher" instead of the liability of a "distributor." *See id.* Thus, even though the courts in *Cubby* and *Stratton Oakmont* both recognized the distinction between publisher

liability and distributor liability, in characterizing the ISP's function, they reached very different results. The ISP in *Stratton Oakmont*, merely by virtue of its "Good Samaritan" editorial policies, was held liable for matter published on its service by third parties, even though it was not alleged to have had actual knowledge of the content of the publication.

This was obviously the legal conclusion which Congress, in enacting the CDA promptly thereafter, sought to change.[15] It reflected this intent in two ways. First, the

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[15] This conclusion is further bolstered by the fact that Congressman Cox, the coauthor of section 230, during floor debate on the measure, spoke not only about the *Stratton Oakmont* decision, but also about the result reached in *Cubby*, stating:

> A Federal court in New York, in a case involving CompuServe, one of our online service providers, held that CompuServe would not be liable in a defamation case because it was not the publisher or editor of the material. It just let everything come onto your computer without, in any way, trying to screen it or control it.

141 Cong. Rec. H8460-01 (daily ed. Aug. 4, 1995) (statement of Mr. Cox). This statement by Representative Cox underscored the dilemma posed by the *Cubby/Stratton Oakmont* analytical schism. As observed by one legal commentator: In the wake of [*Stratton Oakmont*], it is likely that most major commercial online services will be faced with difficult choices. A service might choose to institute very strict standards to prevent any such defamatory language from reaching the bulletin boards. Alternatively, it might choose to take a totally hands-off approach in order that it appear to have no editorial control whatsoever, so as to fall under the auspices of a distributor rather than a publisher. Siderits, *supra* note 11, at 1080. While the legislative history reflects Congress's intent to "overrule"

language of the statute itself could not be more explicit. It provides, in § 230(c) ("Protection for 'Good Samaritan' blocking and screening of offensive material") that "[n]o provider or user of an interactive computer service shall be treated *as the publisher or speaker* of any information *provided by another* information content provider." In *Zeran* and the majority view here, however, this statement that an ISP shall not be treated as a "publisher or

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Stratton Oakmont, there is no similar mention of a desire to "overrule" *Cubby* (despite the fact that Congress was not only presumed to be aware of that decision, but was actually reminded of it during legislative debate). Thus, as one legal commentator observed:

> The result of the CDA was the re-emergence of the holding in *Cubby*. This distinction once made by the district court in *Cubby*, resurrected by Congress' CDA, seemingly destroyed any other interpretation of provider/distributor liability for ISPs. The CDA reduced the field to only distributor-type liability. Hence, individuals pursuing providers for defamatory messages posted via their servers can only prevail if the provider knew or had reason to know of the defamatory messages. Accordingly, an ISP would be akin to a bookseller, vendor, or distributor. In this manner, Congress maintained an ISP's ability to exercise editorial control without being subject to a publisher's strict liability. This pendulum, which was finally set by Congress through the CDA legislation, was then pushed in another direction with the emergence of Zeran v. America Online, Inc.

Michael H. Spencer, *Defamatory E-Mail and Employer Liability: Why Razing Zeran v. America Online is a Good Thing*, 6 Rich. J.L. & Tech. 25, 9 (2000) (footnotes omitted) (criticizing as erroneous *Zeran*'s interpretation of the CDA as eliminating ISP distributor liability).

speaker" of third-party information has been interpreted to mean not only that an ISP can never be subject to liability for negligence as a "publisher" of third-party information appearing on its service, but also that an ISP can never be subject to liability based upon its own patently irresponsible role as a distributor who has allegedly been given actual notice of materials published on its service by a specified customer (in furtherance of criminal conduct as defined by Florida law[16]) by soliciting the purchase and sale of explicit child pornography, yet has done absolutely nothing about it.

This flies in the face of the very purpose of the Communications Decency Act. At least one goal of the CDA is, as its title suggests, to promote "decency" on the Internet.[17] What conceivable good could a statute

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[16] *See* § 827.071(4), Fla. Stat. (1995) (making it illegal for any person "to possess with the intent to promote any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, includes any sexual conduct by a child").

[17] *See generally* John Schwartz, *Coalition to File Suit Over Internet Rules: Action Targets New Law as Unconstitutional*, Wash. Post, Feb. 26, 1996, at A4 (explaining that President Clinton signed the CDA into law "to prevent the display of 'patently offensive' materials via computer in a way that minors might see them"), *cited in* Robert T. Langdon, Note, *The Communications Decency Act § 230: Make Sense? Or Nonsense? – A Private Person's Inability to Recover if Defamed in Cyberspace*, 73 St. John's L.Rev. 829, 842 n. 67 (1999). Langdon criticizes the CDA as interpreted to preclude distributor liability, concluding: "There can be no doubt that Internet providers need to assume some responsibility for the materials that pass through their services. The distributor framework appears to be the most logical solution. An Internet provider ought to be liable when it

purporting to promote ISP self-policing efforts do if, by virtue of the courts' interpretation of that statute, an ISP which is specifically made aware of child pornography being distributed by an identified customer through solicitation occurring on its service, may, with impunity, do absolutely nothing, and reap the economic benefits flowing from the activity?

Such an absurd interpretation is totally unwarranted. If Congress had intended absolute immunity, why would it state only that no ISP "shall be treated as a *publisher* or *speaker of* any *information provided by another* information content provider?" As one legal commentator has observed, "[n]otably, the legislation did not explicitly exempt ISPs from distributor liability, and its specific reference to 'publisher or speaker' is evidence that Congress intended to leave distributor liability intact." *Developments in the Law – The Law of Cyberspace, III The Long Arm of Cyber-Reach,* 112 Harv. L.Rev. 1610, 1613 (1999); *see also* David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act upon Liability for Defamation on the Internet,* 61 Alb. L.Rev. 147, 168 (1997) ("[B]oth the text of the CDA and its meager legislative history support the conclusion that when Congress said 'publisher,' it meant 'publisher,' and not 'distributor.' The publisher and distributor terminology have been used in cases and commentary on the subject of defamation in interactive networks. It would be reasonable to surmise that Congress would say 'distributor' in addition

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is placed on notice that it is distributing defamatory material. Anything less is simply irrational and illogical." *Id.* at 855.

to 'publisher' if it meant 'distributor' in addition to 'publisher.')" (footnotes omitted). If blanket immunity were intended, why not state more broadly that no ISP "shall be held liable" for any information provided on its service by another information content provider?[18] In fact, that very phrase was used in the subsection immediately following § 230(c)(1), which provides:

> (2) Civil liability
>
> No provider or user of an interactive computer service *shall be held liable* on account of –
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(Emphasis supplied.)

The reason, pointedly, is that Congress never intended for such a broad immunity to apply. In cutting a

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[18] Moreover, the statute explicitly recognizes that state causes of action which are consistent with the CDA are not precluded by it. It provides, in § 230(e)(3), that "[n]o cause of action may be brought and no liability may be imposed under any State or local law *that is inconsistent with this section. . . .* " (Emphasis supplied.) It also provides: "Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section."

wide swath of immunity from the cloth of this purposefully narrow language, the analysis contained in *Zeran*[19] (and approved by the majority here) turns on its

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[19] While ostensibly following *Zeran*, the decision in *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 206 F.3d 980 (10th Cir.2000), also cited by the majority here, is factually distinguishable. In *Ben Ezra*, the plaintiff argued that AOL was not immune from suit under 47 U.S.C. § 230 because AOL had acted both as an interactive computer service and as an information content provider *by participating in the creation and development of the stock quotation information* which was allegedly defamatory. The federal trial court concluded that AOL qualified for statutory immunity pursuant to § 230, finding no record evidence that AOL had provided any of the stock quote information at issue. On appeal, the plaintiff argued that AOL should be held liable both because it had "worked so closely with ComStock and Townsend in the creation and development of the stock quotation information that it also operated as an 'information content provider,' " and because AOL had "deleted some stock symbols or other information from the data base in an effort to correct the errors." 206 F.3d at 985. The appellate court first stated its belief that the plaintiff had "not demonstrated [AOL] worked so closely with ComStock and Townsend regarding the allegedly inaccurate stock information that [it] became an information content provider." *Id.* The appellate court then observed that, by deleting the symbols, AOL, which "simply made the data unavailable and did not develop or create the stock quotation information displayed," was merely "engaging in the editorial functions Congress sought to protect." *Id.* at 986. Thus, the plaintiff in *Ben Ezra* unsuccessfully sought to hold AOL liable *as an original publisher* based both upon unproven allegations that AOL had become an information content provider by working closely in the development of inaccurate information posted on its Internet site, and upon an erroneous legal theory that AOL's editorial efforts to remove such information after it was posted also rendered AOL liable *as an original publisher. Cf. also Doe v. Franco Productions*, No. 99 C 7885, 2000 WL 816779 (N.D.Ill., Jun.22,

head the very goal of the Communications Decency Act.[20] While Congress has recognized that the Internet presents

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2000) (similarly rejecting, on the basis of immunity, the claim of thirty university football players that the defendant Internet service provider – not shown to be an information content provider, nor alleged to have been given actual notice of any illegal activity – had liability *as a publisher* based upon the posting, sale and dissemination by third-party users of the ISP's web page of certain images of the athletes in various states of undress which, without the athletes' knowledge or consent, had been obtained by use of hidden videotape cameras in restrooms, locker rooms, or showers). While, therefore, application of *Zeran*'s faulty logic was not dispositive based upon the allegations and theories of liability asserted in *Ben Ezra* and *Franco Productions*, nonetheless, the Pied Piper effect of *Zeran*'s initial analysis does appear to have diverted some other authors of its progeny from more closely examining the difference between distributor and original publisher liability where such distinction might arguably apply. In *Green v. America Online, Inc.*, No. 00-3367 (D.N.J. Dec. 20, 2000), for example, the federal district court found that, pursuant to 47 U.S.C. § 230, AOL was immune from suit based upon certain tort claims based upon allegations "that AOL negligently failed to live up to its contractual obligations to Green, by refusing to take the necessary action against [users of an AOL "chat room" in which Green participated] that would prevent them from further harming and defaming [Green]" by impersonating him in sending messages to other men in the chat room asking them for homosexual sex, and in sending messages to women in the chat room telling them that Green was bisexual. The court, in dismissing the plaintiff's tort claims, briefly stated its reliance upon *Ben Ezra* and *Zeran*, wholly failing to address any potential distinction between original publisher liability and distributor liability.

[20] Legal commentaries reflect a variety of views regarding *Zeran;* many of these are critical of *Zeran*'s analysis. *See, e.g.*, Ian Ballon, *Zeran v. AOL: Why the Fourth Circuit Is Wrong*, J. Internet L., Mar. 1998, at 6; Steven M. Cordero, Comment, *Damnum*

a "forum for true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity," 47 U.S.C. § 230(a)(3), the purpose of the CDA is not, as the *Zeran* court espoused, "to promote unfettered speech," *Zeran*, 129 F.3d at 334 – most particularly where such alleged speech is an invitation to purchase child pornography. To the contrary, even where objectionable material may be constitutionally protected, the CDA, which was added to "extend the

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Absque Injuria: Zeran v. AOL and Cyberspace Defamation Law, 9 Fordham Intell. Prop. Media & Ent. L.J. 775 (1999) (criticizing the Fourth Circuit's decision in *Zeran*, arguing that the court overextended protection to ISPs); R. Hayes Johnson, Jr., *Defamation in Cyberspace: A Court Takes a Wrong Turn on the Information Superhighway in Stratton Oakmont, Inc. v. Prodigy Services Co.*, 49 Ark. L.Rev. 589, 595 (1996) (examining the problems that could result from the *Stratton Oakmont* approach); David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act upon Liability for Defamation on the Internet*, 61 Alb. L.Rev. 147 (1997); Michael H. Spencer, *Defamatory E Mail and Employer Liability: Why Razing Zeran v. America Online is a Good Thing*, 6 Rich. J.L. & Tech. 25 (2000); David Wiener, *Negligent Publication of Statements Posted on Electronic Bulletin Boards: Is There Any Liability Left After Zeran?*, 39 Santa Clara L.Rev. 905 (1999). Most particularly where, as here, there is no consensus of opinion expressed by the federal appellate courts to provide guidance regarding the correct interpretation of the federal statute at issue, the opinion expressed in *Zeran* is merely persuasive, and not controlling. *Cf. Gross v. State*, 765 So.2d 39 (Fla.2000) (observing that, where "the various federal circuits are in disagreement on the appropriate definition" of an applicable term under a subject federal statute, this Court is free to adopt either the narrow view or the broad view of the statute, "because the approach used by any particular federal circuit is merely persuasive and not binding").

standards of decency which have protected telephone users to new telecommunications devices" and to "protect the sanctuary of the home from uninvited indecencies," 141 Cong. Rec. S1953 (daily ed. Feb. 1, 1995) (statement of Sen. Exon), sanctions an ISP's good-faith efforts to block its dissemination.[21] Here, moreover, where the communications allegedly pertain to graphic sex acts involving eleven-year-old victims, First Amendment rights are not even implicated.

What *is* implicated is Congress's intent to shield ISPs from liability based solely on self-policing efforts to intercept the very type of material at issue here – conduct defined by society as criminal involving material which is invidiously and perniciously harmful to children. This is reflected in the second hallmark of Congress's intent in enacting the CDA – the statute's legislative history. As expressed in 47 U.S.C. § 230(b), "the stated policy of the United States" is "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." While the majority view recognizes that, as reflected in the legislative history of the CDA referenced in *Zeran*, "the 'disincentive' Congress specifically had in mind was

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[21] Although the Supreme Court later deemed unconstitutional those portions of the CDA which prohibited the transmission of indecent material, *see Reno v. ACLU*, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (approving district court's judgment enjoining the Government from enforcing § 223(a)(1)(B)'s prohibitions insofar as they relate to "indecent" communications and from enforcing § 223(d)), § 230, providing protection for "Good Samaritan" blocking and screening of offensive material, has not been invalidated.

liability of the sort described in *Stratton Oakmont,*" majority at 1016 (quoting *Zeran,* 958 F.Supp. at 1134), what it inexplicably fails to recognize is that this is *not* the distributor liability recognized in *Cubby.* Rather, it is the far stricter standard of publisher liability which was imposed in *Stratton Oakmont,* based solely on the ISP's implementation of laudable, self-regulating efforts to screen inappropriate material prior to its publication,[22] which efforts the CDA – as expressed in the policies set forth as a preamble to the statute – unabashedly encourages.

Given the precise, limiting language of the statute, the stated policy underlying the CDA, and the CDA's

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[22] In light of the various roles which ISPs are now assuming in transmitting information on the Internet, a function-based analysis of potential ISP liability under the CDA would appear to be most appropriate. *See generally* Joshua M. Masur, *A Most Uncommon Carrier: Online Service Provider Immunity Against Defamation Claims in Blumenthal v. Drudge,* 40 Jurimetrics J. 217, 227 (2000) (advocating an approach which reconciles the CDA with the common law by looking to the role played by the ISP in each case: "Functional line-drawing appears to be the only fair, effective, and accurate manner to interpret the statute. Differentiating a common carrier acting as such from one that acts as a republisher provides immunity where appropriate, yet maintains liability where immunity is inappropriate. Such an interpretation would maintain the clear common law standards for republication liability where it remains unchallenged, yet negate the dubious precedent – *Stratton Oakmont* – at which section 230 was squarely directed."); *see also* Sheri Hunter, *Defamation and Privacy Laws Face the Internet,* 17-FALL Comm. Law. 16, 17 (interpreting section 230 of the CDA as granting a "distributor" status to ISPs, and arguing that, when an ISP knowingly distributes defamatory messages, it should not be afforded such a status).

explicit legislative history, it is inconceivable that Congress intended the CDA to shield from potential liability an ISP alleged to have taken absolutely no actions to curtail illicit activities in furtherance of conduct defined as criminal, despite actual knowledge that a source of child pornography was being advertised and delivered through contact information provided on its service by an identified customer, while profiting from its customer's continued use of the service. Such an interpretation transforms a statute intended to further and support responsible ISP efforts to protect children and the public from even questionably harmful and illegal materials into a statute which both condones and exonerates a flagrant and reprehensible failure to act by an ISP in the face of allegedly specific, known dissemination of material unquestionably harmful to children.[23] In my view, the interpretation adopted today provides a foundation for

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[23] The absurd implications of *Zeran* are contrary to the very core of the Communications Decency Act, which, through section 509 of the Telecommunications Act of 1996 (entitled "On-line Family Empowerment") added § 230 (entitled "Protection for private blocking and screening of offensive material"). As stated in one legal commentary:

> The result [in *Zeran*] gives an ironic twist to Congress' response to Stratton Oakmont: information service providers can not incur liability for their failure to monitor content, because to hold otherwise would provide them with an incentive to fail to monitor content! *The CDA's protective umbrella, intended for "good Samaritan" monitors, turns out also to shield those who can not or will not provide such a service.*

Stephen J. Davidson et al., *The Law of Cyberspace Liability of Information Service Providers*, 574 Prac. L. Inst. 143, 155 (2000) (emphasis supplied).

far-ranging forms of illegal conduct (possibly harmful to society in far different ways) which ISPs can, very profitably and with total immunity, knowingly allow their customers to operate through their Internet services. I fear that the blanket immunity interpretation adopted by the majority today thrusts Congress into the unlikely position of having enacted legislation that encourages and protects the involvement of ISPs as silent partners in criminal enterprises for profit. Confident that Congress did not intend such an incongruous result, I respectfully dissent.

PARIENTE and QUINCE, JJ., concur.

APPENDIX 2

District Court of Appeal of Florida,
Fourth District.

Jane DOE, mother and legal guardian of John Doe, a minor, Appellant,

v.

AMERICA ONLINE, INC., a foreign corporation, and Richard Lee Russell, individually, Appellees.

No. 97-2587.

Oct. 14, 1998.

Brian W. Smith of Law Office of Brian W. Smith, West Palm Beach, for appellant.

L. Martin Reeder, Jr. of Steel Hector & Davis LLP, West Palm Beach, Patrick J. Carome, John Payton, Lynn R. Charytan and Samir Jain of Wilmer, Cutler & Pickering, Washington, D.C., and Randall J. Boe, Dulles, VA, for Appellee-America Online, Inc.

DELL, Judge.

Jane Doe appeals the trial court's order dismissing with prejudice her complaint against America Online, Inc. ("AOL"). She argues that the trial court erred when it considered matters outside the four corners of the complaint, when it denied her leave to amend, when it retroactively applied section 230 of the Communications Decency Act, 47 U.S.C. § 230 et seq. ("CDA"),[1] to her complaint, and when it concluded that under the CDA, AOL is statutorily immune from her claims. We affirm.

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[1] Communications Decency Act, Pub.L. No. 104-104, § 230, 110 Stat. 137 (Feb. 8, 1996).

On January 23, 1997, Doe filed a six count complaint against Richard Lee Russell and AOL to recover for emotional injuries suffered by her son, John Doe. She claimed that in early 1994, Russell lured John Doe (then eleven years old) and two other minor males to engage in sexual activity with each other and with Russell. She asserted that Russell photographed and videotaped these acts and utilized AOL's "chat rooms" to market the photographs and videotapes, and to later sell a videotape to a man in Arizona.

In count one, Doe alleged that AOL violated section 847.011(1)(a), Florida Statutes (1995), by knowingly allowing and permitting Russell "to sell, distribute, transmit or offer to sell, distribute or transmit photographs and videotape containing the images of the minor Plaintiff, JOHN DOE, which were unlawful and obscene." In count two, she alleged that AOL violated section 847.0135(2), Florida Statutes, the Computer Pornography and Child Exploitation Prevention Act of 1986, by allowing Russell to distribute an advertisement offering "a visual depiction of sexual conduct involving [John Doe]" and by allowing Russell to sell child pornography, thus aiding in the sale and distribution of child pornography. In count three, she claimed that section 847.0135, Florida Statutes, is specifically designed to protect a certain class of persons, and its violation constitutes negligence per se. In her fourth count, Doe asserted a claim for negligence because AOL knew, or should have known, that Russell and others like him used the service to market and distribute child pornographic materials, that it should have used reasonable care in its operation, that it breached its duty, and that the damages to John Doe were reasonably

foreseeable as a result of AOL's breach. The two final counts were directed at Russell.

Doe also alleged that AOL, a "computer on-line, interactive information, communication and transaction service" promulgated "Terms of Service" ("TOS") and "Rules of the Road" ("ROR") and required its members to adhere to their terms. She claimed that the TOS and ROR prohibited members from posting or transmitting "unlawful, harmful . . . obscene . . . or otherwise objectionable" material on AOL, including material encouraging criminal conduct. She also claimed that AOL reserved the right to monitor the public areas and chat rooms to ensure that members adhered to the TOS and ROR and reserved the right to "prohibit conduct, communication, or content which it deems in its discretion to be harmful to individual members, the communities which make up the AOL Service, AOL, INC.'S or *other third party rights* or to violate any applicable law." (emphasis in original). Further, she claimed that complaints had been communicated to AOL regarding Russell's transmitting obscene and unlawful photographs and/or images, and that although AOL reserved the right to terminate, without notice, the service of any member who did not abide by the TOS, AOL did not warn or advise Russell to stop, nor did it suspend or terminate his service. Doe did not allege that Russell transmitted photographs or images of her son.

AOL moved to dismiss Doe's complaint, arguing that her claims are barred by 47 U.S.C. § 230, the Communications Decency Act, which prohibits civil actions that treat the provider of an interactive computer service as the "publisher or speaker" of messages transmitted over its

service by third parties. AOL also argued that Doe's claims were barred because they seek recovery for emotional injuries, and Doe failed to allege physical injury resulting from a physical impact or such egregious conduct to satisfy the exceptions to the impact rule. Finally, AOL argued that Doe's claims under the criminal obscenity statutes, as well as her claim of negligence per se, are barred because violation of these statutes does not create separate causes of action.

The trial court concluded that the immunities provided by section 230 of the CDA applied to Doe's claims and granted AOL's motion to dismiss with prejudice. The trial court stated that "[m]aking AOL liable for Russell's chat room communications would treat AOL as the 'publisher or speaker' of those communications." The court also concluded, "Because Section 230 bars all of Doe's claims against AOL, the Court neither reaches nor decides whether AOL's state law grounds for dismissal also bars these claims."

The trial court relied on *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir.1997), *cert. denied*, 524 U.S. 937, 118 S.Ct. 2341, 141 L.Ed.2d 712 (1998), as primary authority for its dismissal. In *Zeran*, on April 25, 1995, an unidentified person posted a message on an AOL bulletin board advertising "Naughty Oklahoma T-Shirts" featuring offensive and tasteless slogans related to the bombing of the Alfred P. Murrah Federal Building in Oklahoma City. *Id.* at 329. The person who posted this message instructed those interested in purchasing a shirt to call "Ken" at Zeran's home telephone number, resulting in a large number of angry messages and several death threats. *Id.* Zeran could not change his telephone number because he

operated a business out of his home and needed to keep that number. *Id.* After he notified AOL about the situation, an employee told him that AOL would remove the posting but would not post a retraction. *Id.*

The next day, another message was posted advertising similar shirts, instructing interested buyers to call Zeran's home telephone number, and to call back if the phone is busy due to high demand. *Id.* Over the next four days, more messages were posted on AOL's bulletin board, and after the threatening phone calls intensified, Zeran repeatedly called AOL and was told that "the individual account from which the messages were posted would soon be closed." *Id.* Within a week of the first message, "Zeran was receiving an abusive phone call approximately every two minutes." *Id.* After a radio station learned of the posting and announced it on the air, he received so many threatening phone calls that he needed police protection. *Id.*

On January 4, 1996, Zeran filed suit against the radio station, and on April 23, 1996, he filed suit against AOL. AOL answered the complaint and asserted 47 U.S.C. § 230 as an affirmative defense. *Id.* The trial court granted AOL's motion for summary judgment on the grounds that section 230 barred Zeran's claims. *Id.* at 328.

On appeal, Zeran argued that the CDA could not be retroactively applied to bar his claim against AOL for acts occurring prior to its enactment. Section 230 of the CDA became effective on February 8, 1996. The Fourth Circuit Court of Appeals stated, "Section 230 applies by its plain terms to complaints brought after the CDA became effective." *Id.* at 334. The court stated,

> Initially, it is doubtful that a retroactivity issue is even presented here. Retroactivity concerns arise when a statute applies to conduct predating its enactment. Section 230 does not directly regulate the activities of interactive computer service providers like AOL. Instead, § 230 is addressed only to the bringing of a cause of action. Here, Zeran did not file his complaint until over two months after § 230's immunity became effective. Thus, the statute's application in this litigation is in fact prospective.

Id. at 334-35. The court went on to state that even if the facts implicated the application of section 230 to pre-enactment events, the analysis in *Landgraf v. U.S.I. Film Prods.*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), would nevertheless require application of section 230 to Zeran's claims:

> *Landgraf* instructs us first "to determine whether Congress has expressly prescribed the statute's proper reach." This case can be resolved at this first step. In § 230(d)(3), Congress clearly expressed its intent that the statute apply to any complaint instituted after its effective date, regardless of when the relevant conduct giving rise to the claims occurred. Other circuits have interpreted similar statutory language to clearly express Congress' intent that the relevant statutes apply to bar new actions under statutorily specified conditions.
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> . . . .
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> Section 230 neither imposes any new liability on Zeran nor takes away any rights acquired under prior law. No person has a vested right in a nonfinal tort judgment, much less an unfiled tort claim. Furthermore, Zeran cannot point to

> any action he took in reliance on the law prior to § 230's enactment. Because § 230 has no untoward retroactive effect, even the presumption against statutory retroactivity absent an express directive from Congress is of no help to Zeran.

Zeran, 129 F.3d at 335 (citations omitted).

Doe argues, as did Zeran, that the trial court erred by applying section 230 to the complaint because it constitutes an improper retroactive application. Here, the events leading to the suit occurred in early 1994. The CDA was enacted on February 8, 1996. Doe did not file her complaint against AOL until January 23, 1997. *Zeran* establishes that "[s]ection 230 applies by its plain terms to complaints brought after the CDA became effective." *Id.* at 334. Doe's complaint was filed almost a full year after the CDA became effective. *Zeran* also provides that *Landgraf*'s retroactive application analysis is not problematic because Congress expressly prescribed section 230's proper reach. *Id.* at 335. Further, the presumption against statutory retroactivity is of no help where the plaintiff cannot point to any action taken in reliance on the law prior to section 230's enactment. *Id.* Here, Doe does not allege any action taken in reliance on the law existing prior to section 230's enactment. For the reasons expressed in *Zeran*, we conclude that the trial court did not retroactively apply section 230 to Doe's complaint.

Doe contends that the trial court considered sources outside the four corners of the complaint when it granted AOL's motion to dismiss based on the CDA. She claims that the court erred by referring to information not contained on the face of the complaint: the statement that

"millions of subscribers transmit and receive information through computer modem connections," the definition of electronic mail, the court's discussion that Russell pled guilty and is currently serving prison sentences, the definition of "interactive computer service" as defined in section 230(e)(2), the inclusion of policy statements and legislative history of section 230, and the reference to the Fourth Circuit Court of Appeals' holding in *Zeran*, 129 F.3d at 327. We agree with AOL that the information alleged in the complaint furnished a sufficient basis for application of the CDA and that the trial court did not err when it made references to the foregoing information.

Doe also argues that the preemption defense based on section 230 of the CDA constitutes an affirmative defense that should have been raised in an answer, not on a motion to dismiss. She cites *Martin v. Eastern Airlines, Inc.*, 630 So.2d 1206 (Fla. 4th DCA 1994), where this court stated that an appellee's "attempt to raise the preemption defense in the instant negligence action by way of a motion to dismiss, without having raised it in the answer is violative of Florida Rule of Civil Procedure 1.110(d)." *Id.* at 1208. However, rule 1.110(d) provides that "[a]ffirmative defenses appearing on the face of a prior pleading may be asserted as grounds for a motion or defense under rule 1.140(b)." Failure to state a cause of action is an affirmative defense under Florida Rule of Civil Procedure 1.140(b). Here, because the predicate facts for the defense of preemption appear on the face of the complaint, the trial court did not err when it considered section 230 as a grounds for dismissal. *See* Fla. R. Civ. P. 1.110(d).

Doe maintains that section 230 is inapplicable because she seeks to hold AOL liable as a distributor of child pornography, not as a publisher or a speaker. This is the same argument considered by the court in *Zeran*. Zeran argued that section 230 immunity eliminated publisher liability, but left distributor liability intact because the notice element for distributors permitted liability if AOL had sufficient notice. *Id.* at 331. In *Zeran*, the court stated,

> By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content – are barred.
>
> . . . .
>
> Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

Id. at 330-31. The Fourth Circuit Court of Appeals then stated,

> The simple fact of notice surely cannot transform one from an original publisher to a distributor in the eyes of the law. *To the contrary, once a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher. The computer service provider must decide whether to publish, edit, or withdraw the posting. In this respect, Zeran seeks to impose liability on AOL for assuming the role for which § 230 specifically proscribes liability – the publisher role.*
>
> . . . .
>
> If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement – from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context.

Id. at 332-33 (emphasis added).

It is clear from the trial court's order that it concluded that section 230 preempted the statutory and common laws of the State of Florida. The trial court's conclusion is consistent with *Zeran*. In *Zeran*, the court stated,

> While Congress allowed for the enforcement of "any State law that is consistent with [§ 230]," 47 U.S.C. § 230(d)(3), it is equally plain that Congress' desire to promote unfettered speech on the Internet must supersede conflicting common law causes of action. Section 230(d)(3) continues: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." With respect to federal-state preemption, the Court has advised: "[W]hen Congress has 'unmistakably . . . ordained,' that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. The result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."

Id. at 334 (citation omitted).

We hold that the trial court did not err when it denied Doe leave to amend because the complaint cannot be amended to overcome section 230 immunity. For the reasons expressed in *Zeran* as set forth in this opinion, we affirm the trial court's dismissal of Doe's complaint with prejudice.

We deem the questions raised as to the application of section 230 of the Communications Decency Act to be of great public importance and certify the following questions to the Florida Supreme Court:

> Whether section 230 of the Communications Decency Act applies to complaints filed after its effective date where the complaint alleges a cause of action based upon acts occurring prior to its effective date?

If the answer is in the affirmative, whether section 230 of the Communications Decency Act preempts Florida law?

And whether a computer service provider with notice of a defamatory third party posting is entitled to immunity under section 230 of the Communications Decency Act?

AFFIRMED.

GUNTHER and WARNER, JJ., concur.

APPENDIX 3

Florida Circuit Court.

Jane DOE, mother and legal guardian of John Doe, a minor, Plaintiff,

v.

AMERICA ONLINE, INC., a foreign corporation, and Richard Lee Russell, individually, Defendants.

No. CIV. CL 97-631 AE.

June 26, 1997.

ORDER DISMISSING CLAIMS AGAINST DEFENDANT AMERICA ONLINE, INC.

PER CURIAM.

This matter comes before the Court on Defendant America Online, Inc.'s ("AOL") motion to dismiss pursuant to Rule 1.140(b)(6), Fla.R.Civ.P. Having reviewed the entire record herein, including the briefs filed by AOL and the Plaintiff, and having heard argument from all parties at a hearing on June 13, 1997, the Court now grants AOL's motion and dismisses all of the Plaintiff's claims against AOL with prejudice for the reasons set out below.

I.

AOL operates an interactive computer service over which millions of subscribers transmit and receive information through computer modem connections to AOL's computer network. AOL subscribers may communicate with one another over AOL's service in a variety of ways, including electronic mail (private electronic communications addressed to specific recipients), message boards (topical forums where subscribers post messages that

may be read by all other subscribers), and "chat rooms." Chat rooms are forums in which two or more subscribers may conduct real-time, computer-to-computer conversations, with the statements of each speaker briefly appearing on the computer screens of other participating subscribers.

The Complaint alleges that in early 1994 Defendant Richard Lee Russell committed sexual battery on John Doe, who was then eleven years old, and two other minor males.[1] Russell allegedly engaged Doe and the other minors to perform sexual activities with him and with one another, (Complaint ¶ 23), and he allegedly viodetape [sic] and photographed these sexual acts. (*Id.* ¶ 24.) The Complaint further alleges that Russell became an AOL subscriber in late 1993 or early 1994 and that he communicated with other people in AOL chat rooms "to advertise/and or solicit" and arrange for "the sale and distribution of" the aforementioned videotape and photographs. (*Id.* ¶¶ 24-26, 28.) The Complaint alleges that Russell's chat room conversations "openly described the contents of the videotape and photographs . . . and included the exchange of addresses and telephone numbers for purposes of the sale of . . . pornographic materials." (*Id.* ¶ 26.)

The Complaint does not allege that Russell ever transmitted any obscene material – including any material depicting Doe – over AOL's service. The only alleged obscene "transmission" specifically referenced in the

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[1] For purposes of a Rule 1.140(b)(6) motion, all material allegations in the Complaint are taken as true. *Cyn-Co. Inc. v. Lancto*, 677 So.2d 78, 79 (Fla.2d Dist.Ct.App.1996).

Complaint – a single instance in which Russell allegedly sent a videotape through the U.S. mail to an Arizona man – did not involve use of AOL's service. (*Id.* ¶ 27.) The Complaint alleges that AOL was "on notice" that its service was being used for marketing of child pornography material and that complaints regarding Russell were communicated to AOL. (*Id.* ¶¶ 21-22.) The Complaint alleges that Doe suffered emotional injuries – *i.e.*, "humiliation, embarrassment, mental anguish, loss of the capacity for the enjoyment of life, and expense of psychological care" – as a result of Russell's alleged distribution of the videotape and photographs depicting Doe. (*Id.* ¶¶ 30, 34, 39, 44.)

Defendant Russell is presently serving lengthy federal and state prison sentences arising out of events relating to those alleged in the Complaint. He pled guilty and was convicted of federal charges of sexual exploitation of children and transportation of sexually explicit material involving a minor and state criminal charges of attempted capital sexual battery.

The Complaint asserts four counts against AOL. Counts I and II purport to state claims under Fla.St. §§ 847.011(1)(a) and 847.0135(2), respectively, which establish criminal penalties for certain conduct involving the sale or distribution of obscene materials. Count III, captioned "negligence *per se*," also seeks to hold AOL liable for an alleged violation of § 847.0135. Count IV, captioned "negligence," contends that AOL breached an alleged duty to exercise reasonable care to ensure that its service not be used for the "purposes of the sale and/or distribution of child pornography." (Complaint ¶ 41.) The

Complaint also asserts two separate counts against Russell for alleged violations of §§ 874.011 and 847.0135.

AOL has moved to dismiss on three separate and independent grounds. First, it asserts that all of Doe's claims against AOL are barred by Section 230 of the Communications Decency Act, 47 U.S.C. § 230, which prohibits civil actions that seek to treat the provider of an interactive computer service as the "publisher or speaker" of messages transmitted over its service by third parties. Second, it asserts that all of Doe's claims against AOL, which seek recovery only for emotional injury, are barred because Doe has failed to allege physical injury resulting from a physical impact. Third, it asserts that Doe's claims against AOL under Florida's criminal obscenity laws, Fla.Stat. §§ 847.011(1)(a) and 847.0135(2), as well as his claim of "negligence *per se*" based on an alleged violation of one of those statutes, fail because Florida law does not provide a private cause of action for violation of those penal statutes.

II.

The Court holds that all of Doe's claims against AOL are barred by 47 U.S.C. § 230. This statute, which became law on February 8, 1996, states:

> No provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

47 U.S.C. § 230(c)(1). It further provides:

> No cause of action may be brought and no liability may be imposed under *any* State or local law that is inconsistent with this section.

Id. § 230(d)(3) (emphasis added).

AOL is an "interactive computer service" as defined in Section 230(e)(2), and the communications allegedly made by Russell in AOL chat rooms are "information provided by another information content provider" within the meaning of Section 230(c)(1). *See Zeran v. America Online, Inc.*, 958 F.Supp. 1124, 1132-33 (E.D.Va.1997). Accordingly, the issue of whether Section 230 operates to bar Doe's claims against AOL reduces to the question of whether imposing liability under state law on the provider of an interactive computer service for injury allegedly resulting from a third party's online communications would treat the provider as "the publisher or speaker" of those communications. If imposing such liability would have this effect, then Section 230 preempts and bars the state-law claims.

Making AOL liable for Russell's chat room communications would treat AOL as the "publisher or speaker" of those communications. First, it would object [sic] AOL to precisely the same legal treatment (i.e, liability for damages allegedly suffered by Doe as a result of the communications) that Doe has sought with respect to Russell, who is the actual "publisher or speaker" of the statements at issue. Second, it would object [sic] AOL to principles of liability that govern traditional publishers (such as newspapers and magazines) but that do not govern entities (such as telephone companies) that provide a service over which numerous third parties may communicate with one another. *See, e.g., Braun v. Soldier of Fortune Magazine, Inc.*,

968 F.2d 1110, 1118-19 (11th Cir.1992), *cert. denied*, 506 U.S. 1071 (1993). Third, it would impose on AOL, as a matter of law, a standard of care that would require AOL to monitor, screen and censor the great volumes of information transmitted over its system by third parties, which are the quintessential activities in which traditional publishers must engage.

Doe argues that Section 230 does not bar the claims against AOL because he has sued AOL in its capacity as a "distributor" – rather than "publisher or speaker" – of Russell's online statements. In support of this argument he cites *Cubby, Inc. v. Compuserve, Inc.*, 776 F.Supp. 135 (S.D.N.Y.1991), a case decided under New York law over four years before enactment of Section 230. But *Cubby* held only that a distributor of online services, as a matter of First Amendment law, may not be held liable for harm resulting from third-party content absent a threshold showing that it "knew or should have known" of the content and it harmful nature. *Id.* at 139-41. *Cubby* did not suggest that holding such a provider liable for negligently "distributing" allegedly harmful third-party content about which the provider "knew or should have known" would not treat it as the "publisher or speaker" of that content. Moreover, the federal court in *Zeran* rejected the same argument now made by Doe, holding that suits for "negligent distribution" of harmful third-party material are simply a species of the broader category of suits for "publishing" such material. *Zeran*, 958 F.Supp. at 1133. Accordingly, to hold AOL liable for negligently "distributing" Russell's chat room statements, as Doe seeks, would treat AOL as the "publisher or speaker" of those statements in violation of Section 230.

The conclusion that Section 230 bars Doe's claims against AOL is reinforced by the statute's policy statement and legislative history. The preamble of Section 230 indicates that problems of harmful speech on computer networks, including speech related to "trafficking in obscenity," should be addressed by "vigorous enforcement of Federal criminal laws" against the originators of such material, not through "Federal or State regulation" of the online services that are used as intermediaries for such speech. *See* 47 U.S.C. §§ 230(a), (b). (The fact that Russell is now serving a federal prison sentence suggests that in this instance the legal system has operated as Congress intended.) The statute's legislative history further evidences a recognition of the impossibility of requiring providers of online services "to edit out information that is going to be coming to them from all manner of sources." 141 Cong.Rec. H4871 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte).

Furthermore, holding AOL liable for harm caused by third-party messages on the theory that it "knew or should have known" of the messages and their harmful nature would defeat one of the other purposes of the Section 230, namely to remove disincentives for providers of online services voluntarily to screen or block objectionable content from their services. 47 U.S.C. § 230(b)(4). As the federal court held in *Zeran*, subjecting such a provider to liability under a "knew or should have known standard" would discourage it from making efforts to screen or block – such as employing persons to monitor subscribers' use of the service – because doing so could provide the basis for finding that it "knew or should have

known" of any harmful content that slips through the editing process. *Zeran*, 958 F.Supp. at 1135.

III.

Doe also argues that Section 230 should not apply at all in this case because, while this suit was filed one year *after* Section 230 was enacted and became effective, Russell[s] alleged chat room communications occurred *before* enactment. The Court concludes that this argument is not persuasive and that Section 230 controls this case.

The question whether a federal statute applies in a case involving pre-enactment events is governed by federal law. The leading authority on this issue is *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994). In *Landgraf*, the Supreme Court set out a two-prong analysis for determining this issue. Under the first prong, which is dispositive here, a federal statute must be construed to control all cases decided after its enactment, including cases dealing with pre-enactment events, if Congress has clearly expressed an intent that the statute reach such cases. *See Landgraf*, 114 S.Ct. at 1505.

Section 230 contains language that clearly expresses an intent that it reaches cases, such as this one, that are filed after the statute's enactment but that involve pre-enactment events. As noted above, in § 230(d)(3), the statute specifically provides, in pertinent part, that

> [n]o cause of action may be brought and no liability may be imposed under any state or local law that is inconsistent with this section.

The plain import of this language is that from the day of enactment forward, "no cause of action may be brought" under any inconsistent state or local law. As the federal district court ruled in *Zeran*,

> [s]uch clear statutory language cannot reasonably [sic] construed to mean that only some [inconsistent] causes of action may be brought, namely those concerning events arising before the CDA. Thus, while Congress has expressed its intent with respect to retroactivity more directly in other circumstances, subsection (d)(3) constitutes an adequately clear statement of Congress' intent to apply § 230 of the CDA to claims that are filed after the enactment of the CDA.

958 F.Supp. at 1135. Accordingly, Section 230 controls this case.[2]

Because Section 230 bars all of Doe's claims against AOL, the Court neither reaches nor decides whether AOL's state law grounds for dismissal also bar these claims. Nor does the Court render any views at this juncture concerning whether or not Doe's separate claims

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[2] Because the analysis under the first prong of the *Landgraf* test yields, without need for further inquiry, the result that Section 230 applies to cases that are filed after enactment but that involve pre-enactment events, the Court need not and does not reach the second prong of the test. The second prong examines whether application of a statute to pre-enactment conduct would have a "retroactive effect," a term of legal art defined in *Landgraf*. 114 S.Ct. at 1505; *see also Hunter v. United States*, 101 F.3d 1565, 1570 (11th Cir.1996), *cert. denied*, 1197 WL 120588 (May 12, 1977) (" :'retroactive effect' . . . does not describe all applications of a statute to preexisting causes of action or pending proceedings").

against Russell, in the form that they are pled, state a valid cause of action against Russell, except to note that a defense under Section 230 is not available to Russell.

* * *

Accordingly, for the reasons set forth above, the Court hereby ORDERS that all of the claims asserted against DEFENDANT AMERICA ONLINE, INC. are dismissed with prejudice.

APPENDIX 4

Supreme Court of Florida

FRIDAY, APRIL 20, 2001

CASE NO.: SC94355
Lower Tribunal No.: 4D97-2587

JANE DOE, ETC. VS. AMERICA ONLINE, INC. ETC., ET AL.

Petitioner(s) Respondent(s)

Motion for Rehearing or for Clarification is hereby denied.

WELLS, C.J., and SHAW, HARDING and ANSTEAD, JJ., concur.
PARIENTE, LEWIS and QUINCE, JJ., dissent.

A True Copy
Test:

/s/ Thomas D. Hall
Thomas D. Hall
Clerk Supreme Court

bh [SEAL]
Served:

BRIAN WILLIAM SMITH
PATRICK J. CAROME
JOHN PAYTON
L. MARTIN REEDER, JR.
SAMIR JAIN
RICHARD LEE RUSSELL
HON. DOROTHY H. WILKEN, CLERK
RANDALL J. BOE
HON. JAMES T. CARLISLE, JUDGE
HON. MARILYN BEUTTENMULLER, CLERK

APPENDIX 5

[Communications Decency Act of 1996 ("CDA"),
Title V, Telecommunications Act of 1996,
Act of Feb. 8, 1996, Pub. L. No. 104-104 (S.652),
1996 U.S.C.C.A.N. (110 Stat.) 133-43]

No. 1 March 1996

UNITED STATES CODE
CONGRESSIONAL AND
ADMINISTRATIVE NEWS

104th Congress – Second Session

SEC. 609. ONLINE FAMILY EMPOWERMENT.

Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end the following new section:

"SEC.230. PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.

"(a) FINDINGS. – The Congress finds the following:

"(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

"(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

"(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

"(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

"(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

"(b) POLICY. – It is the policy of the United States –

"(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

"(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

"(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

"(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their childrens access to objectionable or inappropriate online material; and

"(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

"(c) PROTECTION FOR 'GOOD SAMARITAN' BLOCKING AND SCREENING OF OFFENSIVE MATERIAL –

"(1) TREATMENT OF PUBLISHER OR SPEAKER. – no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

"(2) CIVIL LIABILITY. – No provider or user of an interactive computer service shall be held liable on account of –

"(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or.

"(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

"(d) EFFECT ON OTHER LAWS –

"(1) NO EFFECT ON CRIMINAL LAW. – Nothing in this section shall be construed to impair the enforcement of section 223 of this Act, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

"(2) NO EFFECT ON INTELLECTUAL PROPERTY LAW. – Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

"(3) STATE LAW. – Nothing in this section shall be construed to prevent any Sate from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

"(4) NO EFFECT ON COMMUNICATIONS PRIVACY LAW. – Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

"(e) DEFINITIONS. – As used in this section:

"(1) INTERNET. – The term 'Internet' means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

"(2) INTERACTIVE COMPUTER SERVICE. – The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

"(3) INFORMATION CONTENT PROVIDER. – The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation of development of information provided through the Internet or any other interactive computer service.

"(4) ACCESS SOFTWARE PROVIDER. – The term 'access software provider' means a provider of

software (including client or server software), or enabling tools that do any one or more of the following:

"(A) filter, screen, allow, or disallow content;

"(B) pick, choose, analyze, or digest content; or

"(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content."

* * *

APPENDIX 6

Florida Statutes 847.011 Prohibition of certain acts in connection with obscene, lewd, etc., materials; penalty. –

(1) (a) Any person who knowingly sells, lends, gives away, distributes, transmits, shows, or transmutes, or offers to sell, lend, give away, distribute, transmit, show, or transmute, or has in his possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise in any manner, any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose; or who knowingly designs, copies, draws, photographs, poses for, writes, prints, publishes, or in any manner whatsoever manufactures or prepares any such material, matter, article, or thing of any such character; or who knowingly writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting to state, where, how, of whom, or by what means any, or what purports to be any, such material, matter, article, or thing of any such character can be purchased, obtained, or had; or who in any manner knowingly hires, employs, uses, or permits any person knowingly to do or assist in doing

any act or thing mentioned above, is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. A person who, after having been convicted of a violation of this subsection, thereafter violates any of its provisions, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

* * *

APPENDIX 7

Florida Statutes 847.0135 Computer pornography; penalties. –

(1) SHORT TITLE. – This section shall be known and may be cited as the "Computer Pornography and Child Exploitation Prevention Act of 1986."

(2) COMPUTER PORNOGRAPHY. – A person who:

(a) Knowingly compiles, enters into, or transmits by means of computer;

(b) Makes, prints, publishes, or reproduces by other computerized means;

(c) Knowingly causes or allows to be entered into or transmitted by means of computer; or

(d) Buys, sells, receives, exchanges, or disseminates,

any notice, statement or advertisement, or any minor's name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information, for purposes of facilitating, encouraging, offering, or soliciting sexual conduct of or with any minor, or the visual depiction of such conduct. The fact that an undercover operative or law enforcement officer was involved in the detection and investigation of an offense under this section shall not constitute a defense to a prosecution under this section. Any person who violates the provisions of this subsection commits a felony of the third degree, punishable as provided for in s. 775.082, s. 775.083, or s. 775.084.

(3) CERTAIN USES OF COMPUTER SERVICES PROHIBITED. – Any person who knowingly utilizes a

computer on-line service, Internet service, or local bulletin board service to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child or another person believed by the person to be a child, to commit any illegal act described in chapter 794, relating to sexual battery; chapter 800, relating to lewdness and indecent exposure; or chapter 827, relating to child abuse, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) OWNERS OR OPERATORS OF COMPUTER SERVICES LIABLE. – It is unlawful for any owner or operator of a computer on-line service, Internet service, or local bulletin board service knowingly to permit a subscriber to utilize the service to commit a violation of this section. Any person who violates this section commits a misdemeanor of the first degree, punishable by a fine not exceeding $2,000.

(5) STATE CRIMINAL JURISDICTION. – A person is subject to prosecution in this state pursuant to chapter 910 for any conduct proscribed by this section which the person engages in, while either within or outside this state, if by such conduct the person commits a violation of this section involving a child residing in this state, or another person believed by the person to be a child residing in this state.

APPENDIX 8

[Joint Explanatory Statement of the Committee of Conference,
Report for P.L. 104-104,
Title V – Obscenity and Violence
("Conference Report on the CDA"),
1996 U.S.C.C.A.N. Leg. Hist. 200-11]

No. 1 March 1996

UNITED STATES CODE
CONGRESSIONAL AND
ADMINISTRATIVE NEWS

104th Congress – Second Session

SECTION 509 – ONLINE FAMILY EMPOWERMENT

Senate bill

No provision.

[page 194]

House amendment

Section 104 of the House amendment protects from civil liability those providers and users of interactive computer services for actions to restrict or to enable restriction of access to objectionable online material.

Conference agreement

The conference agreement adopts the House provision with minor modifications as a new section 230 of the Communications Act. This section provides "Good Samaritan" protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any

other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.

These protections apply to all interactive computer services, as defined in new subsection 230(e)(2), including non-subscriber systems such as those operated by many businesses for employee use. They also apply to all access software providers, as defined in new section 230(e)(5), including providers of proxy server software.

The conferees do not intend, however, that these protections from civil liability apply to so-called "cancelbotting," in which recipients of a message respond by deleting the message from the computer systems of others without the consent of the originator or without having the right to do so.

* * *

APPENDIX 9

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR
PALM BEACH COUNTY

CIVIL DIVISION

CASE NO. CL 97-631AE

JANE DOE, mother and legal
guardian of JOHN DOE,
a minor,

Plaintiff,

vs.

AMERICA ONLINE, INC.,
a foreign corporation,
and RICHARD LEE RUSSELL,
individually,

Defendants.
_____/

COMPLAINT

The Plaintiff, JANE DOE, mother and legal guardian of JOHN DOE, a minor, hereby files this suit against AMERICA ONLINE, INC. (hereinafter AOL, INC.), a foreign corporation, and RICHARD LEE RUSSELL (hereinafter RUSSELL), individually, and alleges as follows:

JURISDICTION

1. This is an action for damages in excess of EIGHT MILLION AND NO/100 DOLLARS ($8,000,000.00), exclusive of attorney fees and costs.

2. This Court has jurisdiction over this matter insofar as AOL, INC., during the relevant time periods, operated, conducted, engaged in or carried on a business venture in the State of Florida, including Palm Beach County.

2. Furthermore, at all times material herein, AOL, INC., was engaged in substantial and not isolated service activities within the State of Florida, including Palm Beach County.

3. RUSSELL, at all times material herein, was and is a resident of the State of Florida, and is currently serving time in the corrections system.

VENUE

4. The minor Plaintiff, JOHN DOE, was at all times material herein, a resident of Palm Beach County, Florida and during the relevant time period, was 11 years old.

5. AOL, INC., is a foreign corporation doing business in the State of Florida.

6. RUSSELL, at all times material herein, resided in Palm Beach County, State of Florida.

7. Acts giving rise to this lawsuit occurred, at least in part, in Palm Beach County, State of Florida.

8. At all times material herein, AOL, INC., was and is a corporation authorized to do business in the State of Florida and is doing business in Palm Beach County, Florida.

GENERAL ALLEGATIONS COMMON TO ALL COUNTS

9. The AMERICA ONLINE Service (hereinafter AOL Service) owned and operated by AOL, INC., is a computer on-line, interactive information, communication and transaction service.

10. AOL, INC., during the relevant time period, had promulgated "Terms of Service" (hereinafter TOS) and "Rules of the Road" (hereinafter ROR) and required its members to adhere to same.

11. AOL, INC.'s TOS and ROR prohibited its members from posting on or transmitting through AOL Service any "unlawful, harmful . . . obscene . . . or otherwise objectionable" material, including material that encouraged conduct which would constitute a criminal offense or would otherwise violate any applicable local, state, national or international law.

12. AOL, INC., claimed the right to "electronically monitor its public areas for adherence to its TOS . . . " Public areas has been defined by AOL, INC., as those areas of the AOL Service that are generally accessible to other members, such as chat rooms, message boards and file uploads.

13. AOL, INC., has reserved the right to "prohibit conduct, communication, or content which it deems in its discretion to be harmful to individual members, the communities which make up the AOL Service, AOL, INC.'S or *other third party rights* or to violate any applicable law."

14. AOL, INC., reserved the right to terminate, without notice, any member who misused or failed to abide by its TOS.

15. AOL, INC., had available during the relevant time period means by which to monitor and/or screen the discussions taking place in its public and "member" chat rooms, so as to adequately police members not abiding by the rules, requirements and duties established by AOL, INC.

16. AOL, INC., employed the services of "TOS advisors" and "guides" to purportedly monitor the discussions in the public areas, including public and member chat rooms for any violations of TOS and ROR.

17. The names assigned to some of its public and "member" chat rooms put AOL, INC., on notice that the discussions therein involved unlawful, obscene or otherwise objectionable material in violation of TOS and ROR.

18. AOL Service became known to the pedophile community as a place for open discussion, trading and marketing of child pornography.

19. AOL, INC., through its actions or inactions, allowed its AOL Service to become a marketplace for the sale and distribution of child pornography.

20. This marketplace lured otherwise latent pedophiles, including the Defendant, RUSSELL, into openly discussing, marketing, and distributing child pornography materials. In essence, AOL, INC., has created a home shopping network for pedophiles and child pornographers.

21. AOL, INC., was on notice of this use as early as 1991, but allowed these conditions to continue.

22. Complaints were communicated to AOL, INC., regarding RUSSELL transmitting obscene and unlawful photographs and/or images. In fact, copies of the images were forwarded to AOL, INC.'S management. At no time did AOL, INC., warn or advise RUSSELL to cease his activities. Furthermore, at no time did AOL, INC., suspend or terminate RUSSELL'S service with AOL, INC.

23. During early 1994, RUSSELL committed sexual battery on JOHN DOE and two other minor males, engaging them to perform sexual acts with each other and with RUSSELL.

24. During the aforesaid time period, RUSSELL videotaped and photographed these sexual acts.

25. Some time between November 1993 and January 1994, RUSSELL subscribed to AOL, INC., setting up an account with a number of "screen names".

26. During 1994, RUSSELL used the public and "member" chat rooms of AOL, INC., to advertise and/or solicit sales of the aforesaid videotape and photographs. RUSSELL openly described the contents of the videotape and photographs in these public and "member" chat rooms. Arrangements were made between RUSSELL and other AOL members for the sale of the videotape and photographs. These discussions took place in the public and "member" chat rooms and included the exchange of addresses and telephone numbers for purposes of the sale of unlawful, harmful, obscene and pornographic materials.

27. As a result of these discussions a sale was arranged between RUSSELL and a Daniel Hood who resided in Arizona. A videotape containing images of the minor Plaintiff, JOHN DOE, was mailed to Daniel Hood. These images include child pornography involving the minor Plaintiff and other obscene, harmful and unlawful materials.

28. During 1994, RUSSELL made arrangements with other AOL members during discussions in the chat rooms for the sale and distribution of the aforesaid videotape and photographs, both of which depict obscene and unlawful images of the minor Plaintiff, JOHN DOE.

COUNT I – VIOLATION OF SECTION 847.011, FLORIDA STATUTES, BY AMERICA ON LINE, INC.

Plaintiff realleges and reavers all of the allegations contained in paragraphs 1 through 28.

29. AOL, INC., violated Section 847.011(1)(a), Florida Statutes, by knowingly allowing and permitting RUSSELL to sell, distribute, transmit or offer to sell, distribute or transmit photographs and videotape containing the images of the minor Plaintiff, JOHN DOE, which were unlawful and obscene.

30. As a result of this statutory violation, Plaintiff has suffered humiliation, embarrassment, mental anguish, loss of the capacity for the enjoyment of life, and expense of psychological care. The losses are either permanent or continuing and Plaintiff will suffer the losses in the future.

WHEREFORE, Plaintiff demands judgment for damages against the Defendant, AOL, INC., and further demands trial by jury.

COUNT II – VIOLATION OF SECTION 847.0135(2), FLORIDA STATUTES, BY AMERICA ON LINE, INC.

Plaintiff realleges and reavers all of the allegations contained in paragraphs 1 through 30.

31. AOL, INC., violated Section 847.0135(2), Florida Statutes, (more commonly known as the Computer Pornography and Child Exploitation Prevention Act of 1986), by knowingly allowing RUSSELL to enter into or transmit by means of computer the distribution of an advertisement for the purposes of offering a visual depiction of sexual conduct involving the minor Plaintiff, JOHN DOE.

32. AOL, INC., further violated this section by knowingly allowing RUSSELL to sell or arrange to sell child pornography.

33. By its actions or inactions, AOL, INC., has aided in the sale and distribution of child pornography, including obscene and unlawful images of the minor Plaintiff, JOHN DOE.

34. As a result of this statutory violation, Plaintiff has suffered humiliation, embarrassment, mental anguish, loss of the capacity for the enjoyment of life, expense of psychological care, and aggravation of a previously existing condition. The losses are either permanent or continuing and Plaintiff will suffer the losses in the future.

WHEREFORE, Plaintiff demands judgment for damages against the Defendant, AOL, INC., and further demands trial by jury.

COUNT III – NEGLIGENCE PER SE AS TO AMERICA ON LINE, INC.

Plaintiff realleges and reavers all of the allegations contained in paragraphs 1 through 34.

35. Section 847.0135, Florida Statutes (more commonly known as the Computer Pornography and Child Exploitation Prevention Act of 1986) is a statute specifically enacted to protect a specific class of persons, to wit children under the age of 18.

36. The injury sustained by the Plaintiff, as set forth above, is the type of injury that Section 847.0135, Florida Statutes, was designed to protect.

37. By knowingly allowing the transmission of discussions and/or advertisements regarding the visual depiction of sexual conduct involving a minor, AOL, INC., has failed to comply with the provisions of Section 847.0135.

38. AOL, INC.'S violation of Section 847.0135, Florida Statutes, constitutes negligence per se.

39. As a result of AOL, INC.'S negligence per se, Plaintiff has suffered humiliation, embarrassment, mental anguish, loss of the capacity for the enjoyment of life, and expense of psychological care. The losses are either permanent or continuing and Plaintiff will suffer the losses in the future.

WHEREFORE, Plaintiff demands judgment for damages against the Defendant, AOL, INC., and further demands trial by jury.

COUNT IV – NEGLIGENCE OF AMERICA ONLINE, INC.

Plaintiff realleges and reavers all of the allegations contained in paragraphs 1 through 39.

40. AOL, INC., knew or, in the exercise of reasonable care, should have known that its AOL Service was being used by RUSSELL and other child pornographers to market, advertise and/or distribute child pornography materials, including videotapes and photographs.

41. AOL, INC., had a duty to exercise reasonable care in the operation of its AOL Service to ensure that its AOL Service was not being used for the purposes of the sale and/or distribution of child pornography.

42. AOL, INC., breached this duty by:

a. failing to enforce its "Terms of Service" (TOS);

b. failing to enforce its "Rules of the Road" (ROR);

c. failing to monitor chat room discussions for violations of TOS and ROR;

d. failing to properly train and supervise its "TOS advisors" and "guides" in the enforcement of TOS and ROR;

e. failing to terminate the privileges of members who were using its public and "member" chat rooms to distribute, sell or advertise child pornography; and

f. failing to utilize all means available to monitor, screen and govern illegal activities that were taking place in its "member" and public chat rooms.

43. It was reasonably foreseeable that the aforesaid breach of duty would result in damages to the minor Plaintiff, JOHN DOE.

44. As a result of the aforesaid breach, Plaintiff has suffered humiliation, embarrassment, mental anguish, loss of the capacity for the enjoyment of life, and expense of psychological care. The losses are either permanent or continuing and Plaintiff will suffer the losses in the future.

WHEREFORE, Plaintiff demands judgment for damages against the Defendant, AOL, INC., and further demands trial by jury.

COUNT V – VIOLATION OF SECTION 847.0135, FLORIDA STATUTES, BY RICHARD LEE RUSSELL

Plaintiff realleges and reavers all of the allegations contained in paragraphs 1 through 44.

45. RUSSELL violated Section 847.0135 (commonly known as the Computer Pornography and Child Exploitation Prevention Act of 1986) by knowingly transmitting by means of computer descriptions and/or advertisements for the sale of videotapes and/or photographs

containing the visual depiction of sexual conduct of or with the minor Plaintiff, JOHN DOE.

46. As a result, the Plaintiff has suffered humiliation, embarrassment, mental anguish, loss of the capacity for the enjoyment of life, and expense of psychological care. The losses are either permanent or continuing and Plaintiff will suffer the losses in the future.

WHEREFORE, Plaintiff demands judgment for damages against the Defendant, RUSSELL, and further demands trial by jury.

COUNT VI – VIOLATION OF SECTION 847.011, FLORIDA STATUTES, BY RICHARD LEE RUSSELL

Plaintiff realleges and reavers all of the allegations contained in paragraphs 1 through 46.

47. RUSSELL violated Section 847.011(1)(a), Florida Statutes, by knowingly selling, distributing, transmitting or offering to sell, distribute or transmit or advertising for the sale, distribution, or transmission of photographs and videotape depicting sexual conduct of or with the minor Plaintiff, JOHN DOE.

48. As a result, Plaintiff has suffered humiliation, embarrassment, mental anguish, loss of the capacity for the enjoyment of life, and expense of psychological care. The losses are either permanent or continuing and Plaintiff will suffer the losses in the future.

WHEREFORE, Plaintiff demands judgment for damages against the Defendant, RUSSELL, and further demands trial by jury.

DATED this 23 day of January, 1997.

SMITH, RUSSO & ALOFS, P.A.
580 Village Boulevard
Suite 260
West Palm Beach, FL 33409
Tel: (407) 684-0290
Fax: (407) 688-0630

/s/ Brian W. Smith
BRIAN W. SMITH
Florida Bar No.: 470510

APPENDIX 10

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

JANE DOE, mother and legal guardian of JOHN DOE, a minor, Plaintiff, v. AMERICA ONLINE, INC., a foreign corporation, and, individually RICHARD LEE RUSSELL, Defendants.	Civil Division Case No. CL 97-631AE

DEFENDANT AMERICA ONLINE'S MOTION TO DISMISS

Pursuant to Florida Civ. P. Rule 1.140(b)(6), defendant America Online, Inc. ("AOL"), hereby moves this Court to dismiss Plaintiff's Complaint with prejudice for failure to state a claim upon which relief can be granted. The grounds for this Motion are as follows:

(1) All of Doe's claims against AOL are barred by Section 230 of the Communications Decency Act, 47 U.S.C. § 230, which expressly prohibits civil actions that seek to treat an interactive computer service provider such as AOL as the "publisher or speaker" of messages transmitted over its service by a third party;

(2) All of Doe's claims against AOL fail because they seek recovery only for emotional injury, which under Florida law may be obtained in a negligence suit only if there is also a showing of *physical* injury flowing

from a *physical* impact, neither of which is or can be alleged by Doe against AOL;

(3) Doe's claims against AOL under Florida's criminal obscenity laws, Fla. Stat. §§ 847.011(1)(a) and 847.0135(2), as well as his claim of "negligence *per se*" based on an alleged violation of those statutes, all fail because Florida law does not provide a private cause of action for violation of those penal statutes and "negligence *per se*" is simply a rule of evidence, not an independent cause of action.

Counsel for AOL are filing a separate agreed motion requesting a one hour special appointment hearing on AOL's Motion to Dismiss. Counsel for AOL will seek to agree on a briefing schedule with opposing counsel and will in any event submit a Memorandum of Law in support of this motion prior to the scheduled hearing date.

Respectfully submitted,

/s/ Martin Reeder
L. Martin Reeder, Jr., Esq.
Florida Bar Member
308684
STEEL HECTOR & DAVIS LLP
1900 Phillips Point West
777 South Flagler Drive
West Palm Beach, FL
33401-6198
Telephone: (561) 650-7232
Facsimile: (561) 655-1509

Patrick J. Carome
John Payton
Lynn R. Charytan
Samir Jain
WILMER, CUTLER &
PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
Telephone: (202) 663-6000

Randall J. Boe
Elizabeth deGrazia
Blumenfeld
America Online, Inc.
22000 AOL Way
Dulles, Va 20166-9323
Telephone: (202) 663-6000

ATTORNEYS FOR AMERICA ONLINE, INC.

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 1997, a copy of the foregoing Motion to Dismiss was served by first class mail, postage prepaid, on Brian W. Smith, Esquire, at Smith, Russo & Alofs, P.A., 580 Village Boulevard, Suite 260, West Palm Beach, Florida 33409.

/s/ Martin Reeder

Supreme Court, U.S.
FILED
AUG 21 2001
CLERK

(2)

No. 01-125

IN THE

Supreme Court of the United States

JANE DOE, mother and legal guardian of
JOHN DOE, a minor,

Petitioner,

v.

AMERICA ONLINE, INC.,

Respondent.

On Petition for Writ of Certiorari
To The Supreme Court of Florida

BRIEF OF *AMICI CURIAE* OF ALLIANCE DEFENSE FUND AND FOCUS ON THE FAMILY IN SUPPORT OF PETITIONER

COLBY M. MAY
WALTER M. WEBER
BENJAMIN W. BULL
AMERICAN CENTER FOR LAW AND JUSTICE
1650 Diagonal Road, 5th Fl.
Alexandria, VA 22314
(703) 519-5267

JAY ALAN SEKULOW
Counsel of Record
JAMES M. HENDERSON, SR.
AMERICAN CENTER FOR LAW & JUSTICE
205 Third Street SE
Washington, DC 20003
(202) 546-8890

Attorneys for Amicus Curiae

20 PP

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INTEREST OF AMICI[1]

The **Alliance Defense Fund** (ADF) is a national legal organization committed to protecting family values and defending religious freedoms. ADF provides litigation support in cases that implicate these values. ADF has long been engaged in the battle to protect children and families from the injuries caused by child pornography and obscenity. The Executive Director of ADF, Alan E. Sears, is the former Executive Director of the Attorney General's Commission on Pornography (1985). In that capacity, he oversaw and supervised the drafting of the Commission's Final Report with its recommendations that States adopt laws prohibiting the marketing and distribution of child pornography.

Focus on the Family is a California Nonprofit Religious Corporation committed to strengthening the family in the United States and abroad. The president of Focus on the Family, James C. Dobson, Ph.D., is a child psychologist who has written extensively on child rearing, family relations, and the damaging nature of pornography. Dr. Dobson served as a member of the Attorney General's Commission on Pornography, convened by Attorney General Edwin Meese, III in 1985. Dr. Dobson hosts and Focus on the Family distributes a daily radio broadcast about family issues that reaches approximately 1.7 million listeners each day in the United States, Canada and other western countries. Focus on the

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1. Counsel of record for the parties in this case have consented to the filing of this brief, and their letters are on file with the clerk. Pursuant to Rule 37.6, the *amici* disclose that no counsel for any party in this case authored this brief in whole or in part. No person or entity other than the *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

Family publishes and distributes *Focus on the Family* magazine and other literature that more than two million households receive each month. Focus on the Family believes that the distribution of pornography is harmful to children and should be prohibited in all media available to children.

The amici are profoundly concerned with the victimization of children by child pornographers through the Internet. They believe that the Florida Supreme Court's misinterpretation of section 230(c)(1) of the Communication Decency Act (CDA) directly contravenes the intent of Congress in passing the statute. The amici believe that the decision below prevents the government from achieving its compelling goal of destroying the market for child pornography

Amici share the commitment to defending children and the family. Consequently, the amici support petitioner's argument that the Florida Supreme Court has misinterpreted the CDA by providing "blanket" immunity to Internet Service Providers even when knowingly distributing child pornography. The amici believe that the decision below – granting complete immunity to online service providers for knowingly marketing and distributing child pornography – is in derogation of the text and intent of the CDA.[2]

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2. Counsel for amici curiae have participated in the presentation of numerous cases in this Court involving the construction and application of federal constitutional provisions and statutes, including: *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (42 U.S.C. § 1985(3); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (Free Speech Clause); *National Organization for Women v. Scheidler*, 510 U.S. 249 (1994) (18 U.S.C. §§ 1961-68); *United States v. Kokinda*, 497 U.S. 720 (1990) (Free Speech Clause and 39 C.F.R. § 232.1(h)(1)).

SUMMARY OF ARGUMENT

In the decision in *Doe v. America Online*,[3] the Florida Supreme Court violated the text, intent, and legislative history of the Communications Decency Act (CDA).[4] The language of the statute plainly states that it immunizes Internet Service

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In addition, counsel for amici curiae have represented numerous groups and individuals acting as amici curiae in cases involving construction and application of federal constitutional provisions and statutes: *Board of Educ. v. Grumet*, 512 U.S. 687 (1994) (Establishment Clause); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (First Amendment Freedom of Association); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (Free Speech and Establishment Clauses); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990) (Fourteenth Amendment); *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727 (1996) (Cable Television Consumer Protection and Competition Act of 1992); *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (Free Speech Clause); *Lee v. Weisman*, 505 U.S. 577 (1992) (Establishment Clause); *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994) (Free Speech Clause); *Natl. Interfaith Cable v. FCC*, 512 U.S. 1230 (1994) (Establishment Clause and the Cable Television Consumer Protection and Competition Act of 1992, §§ 4 and 5); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Fourteenth Amendment); *Reno v. ACLU*, 520 U.S. 1113 (1997); *Romer v. Evans*, 517 U.S. 620 (1996) (Equal Protection Clause); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (Free Speech and Establishment Clauses); *Rust v. Sullivan*, 500 U.S. 173 (1991) (42 U.S.C. §§ 300-300a-6 and 42 C.F.R. §§ 59.8-59.10); *Troxel v. Granville*, 530 U.S. 57 (2000) (Fourteenth Amendment); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (Fourteenth Amendment).

3. 783 So.2d 1010 (Fla. 2001).

4. 47 U.S.C. 230.

Providers (ISP's) from "publisher," not "distributor," liability. The legislative history shows that Congress enacted the CDA to overturn the decision of the court in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*[5] In *Stratton Oakmont, Inc.*, the court only imposed liability on an ISP because it had attempted to self-police the materials made available in its online services. The court specifically held Prodigy liable as a "publisher," rather than subjecting it to liability as a "distributor" of third-party information. Congress framed the CDA to protect ISPs from imposition of "publisher" liability, such as occurred in *Stratton Oakmont*, resulting from good faith efforts to police objectionable speech on their bulletin boards and in their chat rooms, even when unsuccessful. Congress did not intend to eliminate "distributor" liability. "Distributor" liability arises when ISPs have knowledge of unlawful material (such as child pornography advertisements) on their bulletin boards and chat rooms and fail to remove it.

If Congress had intended to afford ISPs protection from "distributor" liability and from "publisher" liability, it would have overturned *Cubby v. CompuServe, Inc.*,[6] in which a trial court held that CompuServe was a "distributor" of third-party information.

Moreover, the Florida Supreme Court contravened the intent of Congress in enacting the CDA. Congress undoubtedly sought to encourage ISPs to self-police the content of their sites for offensive materials such as child pornography. The court below created a disincentive for ISPs to act responsibly; it accomplished that result by construing the CDA to immunize

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5. 23 Media L. Rep. (BNA) 1794 (N.Y. Sup. Ct. 1995).

6. 776 F. Supp. 135 (S.D.N.Y.1991).

ISPs from "distributor" liability even when made aware of child pornography on their sites but fail to remove it. Construing the CDA in that way, as the Florida Supreme Court has done, turns the statute on its head.

ARGUMENT

Doe's petition involves the construction and application of section 230 (c)(1) of the Communications Decency Act, 47 U.S.C. 230. That section grants immunity from tort liability to Internet Service Providers ("ISPs"), such as America Online, Inc. ("AOL"), in their capacity as "publisher or speaker" of any information originating with a third party user of the service. The Florida Supreme Court erroneously interpreted the statute to extend immunity for ISPs acting not only in their capacity as "publishers," but acting also in their capacity as knowing "distributors" of unlawful material.

In the facts presented on the present petition, the offending materials consisted of child pornography – videotapes of the eleven-year-old child John Doe.[7] The Florida court's misinterpretation ignores and tortures the language of the federal statue. It rewrites the CDA in derogation of the common law distinctions between information *publisher* liability on the one hand, and information *distributor* liability on the other.[8]

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7. *See Doe v. America Online, Inc., 783* So. 2d 1010,1011-12 (Fla. 2001).

8. The Florida court's erroneous statutory interpretation was largely based on an earlier decision of the Fourth Circuit, *Zeran v. America Online, Inc.*, 129 F. 3d 327 (4th Cir. 1997)(holding that the word "publisher" in the CDA should be read to include "distributor"), a case that has been widely criticized by legal commentators. *See, e.g.*, Ian

Indeed, the Florida court's decision makes the CDA a nullity. It allows ISP's to avoid liability entirely by lumping erroneously these distinct common law tort ideas together. Here, AOL knew that Richard Lee Russell was using its "chat rooms" to market hard core pornographic pictures and videotapes of the child John Doe. Yet AOL took no action to remove it, although AOL purports to police its chat rooms to prevent posting of illegal materials in them. The Florida court's decision takes the CDA, which Congress designed to remove disincentives for ISP's to self-police chat rooms, and gives it the exact opposite effect. Absent the potential for "distributor" liability if it fails to act, an ISP has no incentive to remove objectionable material from its chat rooms and bulletin boards even when it has actual knowledge that the material is present (as happened here). This result completely defeats the purpose of the statute.

For purposes of the present petition, this Court must take the facts alleged in the complaint as uncontested.[9] In 1994,

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Ballon, *Zeran v. AOL: Why the Fourth Circuit Is Wrong*, J. Internet L., Mar. 1998, at 6; David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act upon Liability for Defamation on the Internet*, 61 Alb. L. Rev. 147 (1997); David Wiener, *Negligent Publication of Statements Posted on Electronic Bulletin Boards: Is There Any Liability Left After Zeran?*, 39 Santa Clara L. Rev. 905 (1999); Steven M. Cordero, *Comment, Damnum Absque Injuria: Zeran v. AOL and Cyberspace Defamation Law*, 9 Fordham Intell. Prop. Media & Ent. L.J. 775 (1999).

9. Since the complaint was dismissed on its face pursuant to AOL's motion that the petitioner's claims were barred by 47 U.S.C. 230 (c)(1), the factual allegations contained in the complaint must be taken as true for purposes of the present petition. See *America Online*, 783 So. at

Richard Lee Russell, an adult, lured John Doe, then aged eleven, and two other children to have sexual relations with each other and with him. Russell photographed and videotaped these acts. He then used AOL's "chat room" to market and sell the photographs and videotapes. In 1997, Doe filed an action for damages for emotional injuries against Russell and AOL. In part, Doe alleged that AOL is liable to him as a "distributor" for knowing or having reason to know that Russell and other child pornographers used its service illegally to market and distribute child pornography. The suit alleges that actual complaints had been communicated to AOL about Russell's transmission of child pornography on AOL's "chat rooms." Although AOL reserved the right to terminate service without notice of any member, it neither warned Russell to stop nor suspended his service.[10]

The Florida Supreme Court affirmed dismissal of Doe's complaint. T he court held that section 230(c)(3) of the CDA absolutely immunizes AOL from common law tort actions concerning information it distributes on its service.[11] As discussed below this decision was demonstrably wrong.

1. "Distributors" are not "Publishers" at Common Law

An analysis of the incorrect decision below must begin with a discussion of the distinction between "publisher" liability and "distributor" liability.

It is well established that at common law a "publisher,"

1012-13.

10. *Doe,* 783 So. 2d at 1011-12.

11. *Id.* at 1018.

such as a newspaper, is a person or entity that communicates information, either intentionally or negligently, to a third party who understands the communication.[12] At common law one who repeats, prints, or otherwise publishes a defamatory statement made to another person is as liable for the statement as the original speaker.[13] A publisher that exerts editorial control over its distribution of information can be held liable for defamatory statements in its publication even if it did not know that the statement was in the publication.[14]

"Distributors" (e.g., news vendors, bookstores, and libraries), on the other hand, are held to a different standard than publishers. A distributor is one "who circulates, sells or otherwise deals in the *physical* embodiment of the published material."[15] As the *Restatement (Second) of Torts* states, in contrast to a publisher, a distributor is "one who only delivers or transmits defamatory matter published by a third person."[16]

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12. *See Restatement (Second) of Torts* sec. 577 (1977); *W. Page Keeton, et al., Prosser and Keeton on the Law of Torts* at 798 (5TH ed. 1984).

13. *See Restatement (Second),* at sec. 578. Of course, "publishers" of alleged defamation of "public figures" or involving matters of "public concern" enjoy a higher degree of protection in the law. *See New York Times v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch*, 418 U.S. 323 (1974).

14. *Prosser and Keeton*, at 810.

15. Giorgi Bovenzi, *Liabilities of System Operators on the Internet*, 11 Berkeley Tech. L.J. 93, 135 (1996); *and see Restatement (Second) of Torts*, sec. 581.

16. *Id.*

A distributor of defamatory statements cannot be held liable for defamation unless the claimant shows that the distributor knew or should have known of the defamatory nature of the statement. Unlike a "publisher," a distributor is under no duty to examine the publications to decide if any statements contained therein are tortious.[17]

Thus, if a defendant is a "publisher," a claimant is not required to prove that the defendant was aware of the content of the expression at issue.[18] If a defendant is a "distributor," however, courts do require such proof.[19]

2. *Cubby v. CompuServe, Inc.* and *Stratton Oakmont, Inc. v. Prodigy Services, Inc.*

These distinct forms of liability -- publisher liability and distributor liability -- were applied to online service providers in two important New York cases involving the online transmission of alleged defamatory speech provided by third

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17. *Id.*

18. *See Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 23 Media L. Rep. (BNA) 1794, 1796-98 (N.Y. Sup. Ct. 1995).

19. *See id.* at 1796 (citing *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991) (contrasting the liability of publishers with distributors). *See W. Page Keeton, et al., Prosser and Keeton on the Law of Torts* sec. 113, at 810-11 ("It would appear quite clearly that those who perform a secondary role in disseminating defamatory matter authored and published by others in the form of books, magazines and the like--as in the case of libraries, news vendors, distributors, and carriers--would not be subject to liability to anyone in the absence of proof that they knew or had reason to know of the existence of defamatory matter contained in matter published").

parties. A court must understand *Cubby v CompuServe, Inc.*,[20] and *Stratton Oakmont, Inc. v. Prodigy Services, Inc.*,[21] to understand the purpose of the CDA.

In the 1991 case, *Cubby v. CompuServe, Inc.*, the plaintiff brought a libel action against CompuServe for an alleged libel posted on one of CompuServe's bulletin boards. CompuServe owned and operated the bulletin board. Nonetheless, the court held that it could not have been aware of the alleged statements and, in fact, was not aware because of the number of messages posted.[22]

The *Cubby* court held that CompuServe had no more editorial control over the publication than did a library or bookstore, and that CompuServe was essentially "the functional equivalent of a more traditional news vendor."[23] Based on this lack of control, the court held that CompuServe was a mere "distributor" and that it would not hold it liable for defamation unless Cubby could show that CompuServe knew or should have known of the defamation posted on its bulletin board.[24]

Following closely on the heels of *Cubby*, the 1995 decision in *Stratton Oakmont, Inc. v. Prodigy Services, Inc.*, was the immediate catalyst for the enactment of the CDA. There the

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20. 776 F. Supp. 135 (S.D.N.Y.1991).

21. 23 Med L. Rptr. 1794 (N.Y.Sup. Ct. 1995).

22. 776 F. Supp. at 137.

23. *Id.* at 140.

24. *Id.* at 137-138.

court held that an online service provider, Prodigy, was liable for a defamatory statement posted on its bulletin board.[25] The court found that Prodigy exercised sufficient control over its bulletin board, thereby classifying the service provider as a "publisher."[26] Prodigy used an automatic software screening program to police activity on the bulletin board. Additionally, Prodigy used employees to monitor the content of the bulletin board to comply with certain company guidelines. By making the choice to regulate content on its bulletin boards, Prodigy exerted control over its bulletin board service. Therefore, relying on the analysis in *Cubby*, the *Stratton* court held that Prodigy was a "publisher" and not a "mere distributor" and held Prodigy liable for the defamation.[27]

In analyzing publisher liability, the *Stratton Oakmont* court squarely recognized the distinction between "publisher" and "distributor" liability. The court stated, "[a] finding that [Prodigy] is a publisher is the first hurdle for plaintiffs to overcome in the pursuit of their defamation claims, because one who repeats or otherwise republishes a libel is subject to liability as if he had originally published it."[28] In contrast, distributors such as bookstores and libraries may be liable for the statements of others only if they knew or had reason to know of the statement at issue. A distributor of the material is considered a passive conduit and will not be found liable

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25. 23 Med. L. Rptr. at 1796-97.

26. *Id.* at 1797.

27. *Id.* at 1798.

28. *Id.* at 1796.

without fault.[29]

Thus, the court in *Cubby* held that since CompuServe had not attempted to exercise content control in policing its chat rooms and electronic bulletin boards, it was *not* liable for defamation since it did not fit the common law definition of "publisher." Instead, the court held, CompuServe was a mere "distributor." In *Stratton Oakmont*, on the other hand, Prodigy had, in fact, attempted to self-police its chat rooms by restricting objectionable material. Paradoxically, the court penalized Prodigy for unsuccessfully attempting to police its service; it did this by concluding that Prodigy was liable as a "publisher." Thus *Stratton Oakmont* set up the perverse incentive for ISPs *not* to self-police their bulletin boards and chat rooms since they could be liable as *publishers* if their content restrictions were unsuccessful.

3. Congress Responds to Correct the Perverse Incentives Resulting from *Cubby* and *Stratton Oakmont* by Enacting the Communications Decency Act

Congress then entered the picture and endeavored to overturn *Stratton Oakmont* by legislatively removing the potential for *publisher* liability to encourage ISP's to self-police their services. One year after the *Stratton Oakmont* decision Congress enacted the CDA.

In relevant part the CDA states that "no provider or user of an interactive computer service shall be treated as a *publisher or speaker* of any information provided by another information content provider."[30] As the Conference Report states the

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29. *Id.*

30. *See* 47 U.S.C. 230 (c)(1)(italics added).

purpose of the CDA "is to overrule *Stratton-Oakmont v. Prodigy* and any similar decisions which have treated such providers and users as *publishers or speakers* of content that is not their own because they have restricted access to objectionable material."[31] "[T]his section provides 'Good Samaritan' protections from civil liability for providers or users to objectionable computer service for actions to restrict or to enable restriction of access to objectionable online material."[32]

Thus, by eliminating the potential for "publisher" liability, such as that found in *Stratton Oakmont*, the statute encouraged online service providers to self-police objectionable content on their bulletin boards and chat rooms without penalizing them if they are unsuccessful.[33]

4. Congress Meant "Publisher" When It Used That Term in Section 230(c)(1), and It Did Not Mean "Distributor"

The CDA did not remove *distributor* liability or seek to overturn the *Cubby* decision. To do so would have eliminated the incentive for ISPs to self police their services that Congress sought to achieve by enacting the CDA.

First, as discussed above, the publisher and distributor

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31. S. Conf. Rep. No. 104-230, 435 (1996). *And see* 141 Cong. Rec. S1953 (daily ed. Fed., 1, 1995) (the focus of the CDC is to "promote decency" on the internet).

32. *Id.*

33. *See* James F. Beresford, *Online Liability Issues: Defamation, Invasion of Privacy and Negligent Publishing*, 482 PLI/P 471, 489 (1997) ("The Conference Committee Report specifically states that ...[section 230(c)(1)] is intended to overrule *Stratton Oakmont's* holding").

terminology is not only well known in common law, the *Stratton Oakmont* court used it, and it was widely discussed by legal commentators in the time leading up to the enactment of the CDA.[34] Section 230 expressly refers to online service providers as a "publisher and speaker" of third party content; there is, in contrast, no mention of service providers as "distributors."

Second, the statement in the Conference Report that Congress intended section 230 to overrule *Stratton Oakmont* strongly indicates that Congress intended it to apply only to "publishers."[35] As the Conference Report stated, Congress sought to overrule *Stratton Oakmont*, which found Prodigy to be a "publisher" rather than a "distributor," and immunize online service providers from the imposition of strict liability as "publishers" for their efforts to self regulate, a standard that is not in any way involved with "distributor" liability.[36]

Moreover, since *Stratton Oakmont* did not impose

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34. *See Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 23 Media L. Rep. (BNA) at 1796; Loftus E. Becker, Jr., *The Liability of Computer Bulletin Board Operators for Defamation Posted by Others*, 22 Conn. L. Rev. 203, 225-28 (1989); Henry H. Perritt, Jr., *Tort Liability, the First Amendment, and Equal Access to Electronic Networks*, 5 Harv. J.L. & Tech. 65, 95-99 (1992); Jeffrey M. Taylor, *Liability of Usenet Moderators for Defamation Published by Others: Flinging the Law of Defamation into Cyberspace*, 47 Fla. L. Rev. 247, 273-75 (1995); Robert Charles, *Computer Bulletin Boards and Defamation: Who Should be Liable? Under What Standard?* 2 J.L. & Tech. 121, 130-31 (1987).

35. *See* H.R. Conf. Rep. No. 194-458, at 194 (1996).

36. *See* S. Conf. Rep. No. 104-230, at 435 (1996).

"distributor" liability, it was not necessary for Congress to eliminate "distributor" liability in order to overrule the case. Indeed, immunizing ISPs from "distributor" liability, as the Florida court has done, addresses a concern not present in *Stratton Oakmont*, and would defeat the very purpose of the statute. If Congress had intended to afford ISP's immunity from "distributor" liability, it presumably would have overturned *Cubby v. CompuServe*, which of course held Prodigy liable as a "distributor."

There is no real dispute that it was Congress' intent in enacting the CDA to encourage ISP's to take steps to eliminate objectionable material through their own self-policing methods. In light of *Stratton Oakmont* it makes good sense that the CDA would not penalize unsuccessful ISP efforts to remove unlawful material from their systems. In light of this goal, the elimination of "publisher" liability is fully justified. It is quite another thing, however, for AOL and other ISP's to argue that the statute includes the elimination of "distributor" liability.

To do so would remove the incentive for ISPs to self police their chat rooms that the CDA intended to preserve. Absent the potential for *distributor* liability if it fails to act, an ISP has no legal incentive to remove objectionable material from its service even when it has actual knowledge that the material is present. Indeed, under the Florida court's reading, the CDA hardly qualifies as a "Good Samaritan" statute since to qualify for protection one need merely be a provider or user of an interactive computer service.[37] It is not an overstatement to assert that the Florida court's erroneous construction and application of the CDA will result in an increase rather than a

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37. *See* 47 U.S.C. 230(c).

decrease in the marketing and distribution of child pornography on the Internet since any legal incentive to remove it is now gone.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

COLBY M. MAY
WALTER M. WEBER
BENJAMIN W. BULL
AMERICAN CENTER FOR LAW AND JUSTICE
1650 Diagonal Road, 5th Fl.
Alexandria, VA 22314
(703) 519-5267

JAY ALAN SEKULOW
Counsel of Record
JAMES M. HENDERSON, SR.
AMERICAN CENTER FOR LAW & JUSTICE
205 Third Street SE
Washington, DC 20003
(202) 546-8890

Attorneys for Amicus Curiae